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California Supreme Court Survey -- A Review of Decisions: February 1988-April 1988

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California Supreme Court Survey
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The California Supreme Court Survey is a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of the issues that have been addressed by the supreme court, as well as to serve as a starting point for researching any of the topical areas. The decisions are analyzed in accordance with the importance of the court's holding and the extent to which the court expands or changes existing law. Attorney discipline and judicial misconduct cases have been omitted from the survey.

I. CIVIL PROCEDURE

An order to set aside a default judgment requires only slight evidence and should not be disturbed on appeal absent an abuse of discretion: **Shamblin v. Brattain.**

In *Shamblin v. Brattain*, 44 Cal. 3d 474, 749 P.2d 339, 243 Cal. Rptr. 902 (1988), the supreme court held that the trial court had not abused its discretion in setting aside a default judgment, unanimously reversing the court of appeals.

The underlying case involved a real property dispute in which the defendant and other co-defendants originally prevailed on all matters except attorney's fees, which were reduced. The plaintiff appealed and the defendant Brattain cross-appealed to reinstate the higher attorney's fees. The cross-appeal was dismissed as Brattain neglected to provide funds for transcript preparation. Following this dismissal, Brattain was mistakenly removed from the appellate court clerk's mailing list, and subsequently did not receive any court documents pertaining to the trial. The co-defendants continued to receive notices and documents but did not file response briefs. When the date for filing had passed, the court of appeal, in an unpublished decision, reversed and remanded the trial court decision. Brattain did not receive a copy of the opinion. His attorney then filed a withdrawal from the case, and in so doing, resubmitted Brattain's address to the court. Notice of the retrial was then reportedly sent to the defendant's address although the wrong zip code had been submitted by the defendant's attorney. The defendant denied receiving the notice and did not respond.

Brattain failed to appear at the retrial and a default judgment was entered against him. The defendant eventually obtained information regarding the default, hired a new attorney, and moved to have the default set aside for excusable neglect under section 473 of the Code of Civil Procedure. CAL. CIV. PROC. CODE § 473 (West 1979). The trial court granted the motion.

The court of appeal reversed on the grounds that granting the motion under such circumstances was an abuse of discretion. The supreme court, however, reversed the court of appeal and reinstated the trial court order.

The supreme court emphasized that a factual decision shall not be reversed without a clear abuse of discretion. *See* 5 AM. JUR. 2D *Appeal & Error* § 854 (1962). Furthermore, the court stated that an order setting aside (as opposed to reinstating) a default judgment was

to be accorded great deference, and that only "very slight evidence" was needed to justify lifting the default. *See Weitz v. Yankosky*, 63 Cal. 2d 849, 854, 409 P.2d 700, 704, 48 Cal. Rptr. 620, 624 (1966); *Elston v. City of Turlock*, 38 Cal. 3d 227, 233, 695 P.2d 713, 716, 211 Cal. Rptr. 416, 419 (1985) (citing *Berri v. Rogero*, 168 Cal. 736, 740, 145 P. 95, 97 (1914)). The trial court had viewed all the factual evidence and had made face-to-face determinations of credibility. Thus, although there was evidence to support either finding, the trial court's decision was entitled to deference. *See* 5 CAL. JUR. 3D *Appellate Review* § 473 (1973).

The importance of viewing evidence firsthand should not be underestimated. A reviewing court may not substitute its interpretations of the evidence for those of the trial court, unless it is clear that the trial court exceeded the bounds of reason. The law requires an abuse of discretion which involves a great deal more than a difference in interpretation.

LESLIE GLADSTONE

II. CRIMINAL PROCEDURE

Pursuant to section 667 of the Penal Code, the defendant's entire prior conviction record may be examined when a habitual criminal sentencing enhancement is sought. If the facts of the prior offense are not contained in the record, the court may not impose an enhancement unless the statute involved in the prior offense contains those elements required under section 667: **People v. Guerrero.**

In *People v. Guerrero*, 44 Cal. 3d 343, 748 P.2d 1150, 243 Cal. Rptr. 688 (1988), the supreme court held that to enhance sentences under the habitual criminal provisions of section 667 of the California Penal Code [hereinafter section 667], "the trier of fact may look to the entire record of the conviction" to determine "the truth of a prior-conviction allegation." *Guerrero*, 44 Cal. 3d at 355, 748 P.2d at 1157, 243 Cal. Rptr. at 695; *see* 39 AM. JUR. 2D *Habitual Criminals and Subsequent Offenders* § 26 (1968) (oral testimony of accused, memoranda of the court, and various records may be used to establish the truth of prior conviction). The court's decision expressly overruled the holding in *People v. Alfaro*, 42 Cal. 3d 627, 724 P.2d 1154, 230 Cal. Rptr. 129 (1986), which limited the trier of fact's application of section 667 to only the offenses contained in the judgment which convicted the defendant of the prior offense.

The defendant, Raymond Guerrero, was convicted by a jury for residential burglary. In the penalty phase of the bifurcated trial, the

prosecution contended that the enhancement provisions of section 667 should be imposed as the defendant had two prior convictions for residential burglary. *See generally* 12A C.J.S. *Burglary* § 139 (1980) (punishment for burglary may be enhanced based on prior convictions). After examining the record of the defendant's conviction, the trial court believed it could not strike any prior, and thus added five years for each previous offense to the original sentence of six years.

On appeal, Guerrero maintained that under *Alfaro*, the trial court erred when it determined the truth of the prior conviction based on "evidence beyond the judgment of conviction." *Guerrero*, 44 Cal. 3d at 345, 748 P.2d at 1151, 243 Cal. Rptr. at 689. Agreeing with Guerrero, the court of appeal eliminated the enhancements based on the holding in *Alfaro* that on examination, the record of conviction was limited to " 'the judgment and matters necessarily adjudicated therein.' " *Id.* at 346, 758 P.2d at 1151, 243 Cal. Rptr. at 689. As the crime of residential burglary at the time of Guerrero's prior convictions did not contain all of the elements required for the "serious felony" of residential burglary under old section 1192.7(c) of the Penal Code, the court of appeal reduced the sentence to six years. *See* CAL. PENAL CODE § 1192.7(c) (West 1985) (amended 1986, current version at CAL. PENAL CODE § 1192.7(c) (West Supp. 1988)) (listing serious felonies applicable under section 667); *see also* 12A C.J.S. *Burglary* § 57 (1980) (distinction between types of burglary crimes).

The court determined that sections 667 and 1192.7 apply to criminal conduct and not to "specific criminal offenses." *Guerrero*, 44 Cal. 3d at 348, 748 P.2d at 1152, 243 Cal. Rptr. at 690 (quoting *People v. Jackson*, 37 Cal. 3d 826, 831-32, 694 P.2d 736, 739, 37 Cal. Rptr. 623, 626 (1985)). The court examined the scope a trier of fact may inquire into when the defendant has been previously convicted of residential burglary. To delineate the parameters of this inquiry, the court examined the rationale of *Alfaro*, and concluded that the decisions cited therein did not support the propositions for which they were cited.

The court first examined the holding in *In re McVickers*, 29 Cal. 2d 264, 176 P.2d 40 (1946), which involved an attempt by the prosecution to use a Utah conviction of grand larceny to enhance the penalty for a California conviction for the same crime. The *McVickers* court held that the Utah offense could not be used under the California enhancement provisions, but looked first to the elements of the offense in the respective states. The *McVickers* court noted that grand larceny in Ohio was established when the value of the stolen property exceeded $50, whereas, in California, the property value must exceed

$200. *See* 22 CAL. JUR. 3D *Criminal Law* § 3387 (1985) (prosecution must prove the prior convictions were the type set forth in the enhancement statute). After finding the Utah trial court record silent as to the value of the property, the *McVickers* court was forced to view the property value as no more than $50.01. The *McVickers* holding was interpreted by the *Guerrero* court to suggest that "the court may look to the entire record of the conviction to determine the substance of the prior foreign conviction; when the record [is silent] . . . the court will presume that the prior conviction was for the least offense punishable under the foreign law." *Guerrero*, 44 Cal. 3d at 352, 748 P.2d at 1155, 243 Cal. Rptr. at 693. *See generally* 22 CAL. JUR. 3D *Criminal Law* § 3388 (1985) (enhancements based on crimes in other jurisdictions).

The court then considered the application of the *McVickers* rule in *In re Seeley*, 29 Cal. 2d 294, 176 P.2d 24 (1946) (Oregon conviction of larceny in a building cannot enhance California penalty under burglary provision when trial record clearly indicates the requisite intent for burglary was not present), and *In Re Finly*, 68 Cal. 2d 389, 438 P.2d 381, 66 Cal. Rptr. 733 (1968) (Washington conviction for second degree burglary cannot enhance California penalty under burglary provision where elements of the foreign crime do not include all those required by the California crime). The court rationalized that an examination of the trial court record pertaining to the prior conviction is both desired by the citizenry of California and in the best interest of the criminal justice system. Under this rationale, the court rejected the defendant's contentions that the stated rule was inequitable and subjected criminal defendants to enhanced sentences unforeseen at the original proceeding.

By allowing the trier of fact in a subsequent criminal trial to look beyond the judgment to the entire record of a previous conviction for purposes of determining whether a sentencing enhancement is appropriate, the court has reaffirmed its "hard line" approach to criminal behavior. This decision is based on a somewhat dated trilogy of cases and may create questions as to the type of evidence a defendant may offer in defense. In overruling *Alfaro*, the court illustrated the faulty reasoning of the *Alfaro* decision and added an additional disincentive to habitual criminals who avoid section 667 enhancements by selectively choosing the offenses they commit. With the espoused rule now in place, perhaps the sentencing enhancements available under section 667 will be a sufficient threat to curb the rapidly increasing crime rate in California. *See generally* 2 B. WITKIN, CALIFORNIA CRIMES § 1014(e) (Supp. 1985) (discussion of section 667 history and requirements).

STEVEN L. MILLER

III. EDUCATION

Section 59300 of the Education Code requires school districts to contribute a portion of the cost of educating severely handicapped children, and the districts must be reimbursed under article XIIIB, section 6 of the California Constitution: **Lucia Mar Unified School District v. Honig.**

In *Lucia Mar Unified School Dist. v. Honig*, 44 Cal. 3d 830, 750 P.2d 318, 244 Cal. Rptr. 677 (1988), the California Supreme Court found that section 59300 of the Education Code [hereinafter section 59300], effective in 1981, was in fact a "new program or higher level of service" as contemplated by article XIIIB, section 6 of the California Constitution and therefore required state reimbursement.

Section 59300 states:

> Notwithstanding any provision of this part to the contrary, the district of residence of the parent or guardian of any pupil attending a state-operated school pursuant to this part, excluding day pupils, shall pay the school of attendance for each pupil an amount equal to 10 percent of the . . . excess annual cost of education of pupils attending a state-operated school pursuant to this part.

CAL. EDUC. CODE § 59300 (West Supp. 1988). This provision was enacted in response to the repeal of prior provisions requiring contributions of this type, which left the state to assume full responsibility for funding deaf, blind, and neurologically handicapped schools.

At issue, however, is whether section 59300 is controlled by the constitutional provision adopted by initiative in 1979 which states that "whenever the legislature . . . mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs. . . ." CAL. CONST. art. XIIIB, § 6 (West Supp. 1988).

The Lucia Mar Unified School District, with other school districts joining, followed the prescribed procedure for determining entitlement to reimbursement, by filing a "test claim" before the Commission on State Mandates pursuant to sections 17521, 17551, and 17556 of the Government Code. The districts then petitioned for writ of mandate and sued for declaratory relief and restitution against the Commission, the State Superintendent of Public Instruction and the Department of Education; all claims were denied by the trial court. The court of appeals affirmed the judgment, finding that the "shift in funding of an existing program" does not come within the ambit of the constitutional provision. *Lucia Mar*, 44 Cal. 3d at 834, 750 P.2d at 321, 244 Cal. Rptr. at 679.

However, the supreme court's analysis differed, finding the Education Code does create a new program or increased level of service. The court began by restating the definition of "program" as: "[O]ne that carries out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." *Id.* at 835, 750 P.2d at 322, 244 Cal. Rptr. at 680 (citing *County of Los Angeles v. State*, 43 Cal. 3d 46, 56, 729 P.2d 202, 208, 233 Cal. Rptr. 38, 43 (1987)).

The court found it "unquestionably" clear that section 59300 funds are used to fund a program: the education of handicapped children, with requirements on school districts not equally applicable to all California residents. Although schools for handicapped children are not "new," the contributions required by section 59300 are, since prior to the effective date of the statute, school districts were not required to share these costs.

The court noted that the purpose of the constitutional provision was to "preclude the state from shifting to local agencies the financial responsibility for providing public services in view of other restrictions on taxing and spending power of the local entities." *Id.* at 835-36, 750 P.2d at 322, 244 Cal. Rptr. at 680. The state is not allowed to retain administrative control of a public program and subsequently shift the costs to local entities simply because the programs are not technically "new."

Next, the court decided whether the school districts were "mandated" to make the contributions called for by section 59300. The court did not definitively decide the issue but found that the Commission on State Mandates had the duty to decide, pursuant to section 17551 of the Government Code, whether a local agency is entitled to reimbursement under section 6 of article XIIIB of the California Constitution.

The court also found that the method of collection of funds appropriated by the state is "left to the reasonable discretion of the department." *Lucia Mar*, 44 Cal. 3d at 837, 750 P.2d at 682, 244 Cal. Rptr. at 624. In *Lucia Mar*, the Department of Education sent invoices to school district superintendents and when left unpaid, money was deducted from state appropriations to the districts. The collection methods were found reasonable. Thus, the case was remanded back to the Commission for determination of whether the funds were state mandated.

LISA ELANE SLATER

IV. DEATH PENALTY

A. *A trial court is not required to define for a jury the meaning of the language contained in section 190.2(a)(1) of the Penal Code except when there is a possibility that it will overlap with other special circumstances:* **People v. Howard.**

I. INTRODUCTION

In *People v. Howard*,[1] the California Supreme Court affirmed the defendant's conviction and death penalty sentence for the murder of Walter Berkey.[2] This determination clarified four areas of law. First, the court held that testimony of an admission to a fellow inmate is permissible provided that the state has neither induced nor directed the informant to obtain the incriminating evidence.[3] Second, the court held that a trial court is not required to instruct the jury to utilize a restricted construction of the phrase "for financial gain" unless an overlap with other special circumstances arises.[4] Third, the court found that a prosecutor can introduce evidence during the penalty phase of the trial, even though it was not specifically enumerated in his pretrial notice, provided that opposing counsel is given reasonable opportunity to prepare his case and the evidence is similar in nature to other evidence presented in the pretrial notice.[5] Finally, the court held that the correct standard to apply in determining whether the jury has been improperly instructed or informed as to their responsibilities during the penalty stage is whether the jurors believed that they could not consider relevant mitigating evidence regarding the defendant's background and character in reaching their determination.[6]

II. FACTUAL BACKGROUND

The defendant, Gary Lee Howard, Sr., met Richard "Tony" Lemock in May, 1981. At this time, Lemock was having severe problems with his business competitor, Walter Berkey. Lemock ex-

1. 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (1988) (en banc). Chief Justice Lucas wrote the majority opinion with Justices Mosk, Panelli, Arguelles, Eagleson, and Kaufman concurring. Justice Broussard wrote a separate concurring and dissenting opinion.
2. *Id.* at 385, 749 P.2d at 281-82, 243 Cal. Rptr. at 844-85.
3. *Id.* at 402, 749 P.2d at 293, 243 Cal. Rptr. at 856.
4. *Id.* at 409-10, 749 P.2d at 297-98, 243 Cal. Rptr. at 860-61.
5. *Id.* at 424-25, 749 P.2d at 308-09, 243 Cal. Rptr. at 871-72.
6. *Id.* at 434, 749 P.2d at 314-15, 243 Cal. Rptr. at 878.

plained to the defendant that he was prepared to pay to have Berkey "roughed up" and subsequently offered the defendant $1,500 to perform this task. On May 30, 1981, the defendant and Berkey went to a dairy barn together. The evidence showed that Berkey had been shot at least five times by the same firearm while in the barn. The defendant claimed that a third person committed the murder. However, there was no evidence to substantiate this contention. In fact, the defendant had told three people on separate occasions that he did indeed murder the victim. First, he told his girlfriend, Joy Stevens, that he killed the victim as a favor to Lemock. Second, he told Walter Wilson that his confrontation with the victim did not go as planned, forcing him to act as he did. Finally, he told a fellow inmate, David Kent, that he committed the murder. The defendant then solicited Kent's assistance to kill both Stevens and Wilson.

The jury found that the defendant intentionally murdered the victim for financial gain, which constitutes a special circumstance as set forth in section 190.2(a)(1) of the Penal Code,[7] authorizing the death penalty sentence. The defendant was therefore automatically entitled to this appeal under section 1239(b) of the California Penal Code.[8]

III. THE MAJORITY OPINION

The majority opinion addressed numerous assignments of errors complained of by the defendant, including: (1) the admissibility of the defendant's admission to a fellow inmate;[9] (2) the trial court's refusal to instruct the jury as to a restrictive definition of "for financial gain"; (3) whether certain veniremen were properly excused for cause; (4) whether the court properly admitted evidence during the penalty phase that was not contained in the pretrial notice; and (5) whether the trial court's statements to the jurors during voir dire regarding sympathy were misleading.

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7. CAL. PENAL CODE § 190.2(a)(1) (West Supp. 1988) (intentional murder carried out for financial gain).

8. CAL. PENAL CODE § 1239(b) (West Supp. 1988) ("When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel.").

9. The defendant confessed to the police immediately after his arrest that Lemock offered him $1,500 to "rough up" the victim and that he was in the barn with the victim at the time of the murder, but an unnamed third party actually was responsible for the murder. Defendant objected to the admissibility of these statements. The court held that since the statements were made voluntarily and the evidence did not indicate any coercion by the interrogating officers, the confession was properly admitted into evidence. *Howard*, 44 Cal. 3d at 398-99, 749 P.2d at 290-91, 243 Cal. Rptr. at 853-54.

A. Admission to a Fellow Inmate

At trial, David Kent testified that while he and the defendant were inmates in the county jail, the defendant admitted that he murdered the victim and also asked Kent to help him have both Stevens and Wilson killed. The defendant contended that this testimony was improperly admitted because Kent was acting as a government agent and, therefore, the defendant's sixth amendment right to counsel was violated.[10] The defendant primarily relied on the United States Supreme Court's holding in *United States v. Henry*[11] as authority for his position. In *Henry*, the Court held that testimony of admission to another inmate was improperly admitted.[12] However, the circumstances involved were clearly distinguishable from the present case. Two factors upon which the *Henry* Court based its decision were: (1) the informant appeared to be no more than another inmate but was specifically instructed by the government to be alert for any statements made by the defendant; and (2) the informant received monetary compensation for providing the government with incriminating evidence.[13] In contrast, Kent was not directed by the state to obtain incriminating evidence and he did not receive any compensation or leniency[14] for his testimony.

The court also examined cases decided subsequent to *Henry* that have addressed the issue of jailhouse admissions. In *Kuhlmann v. Wilson*,[15] the Supreme Court stated that mere listening by an informant does not constitute a deprivation of a right to counsel.[16] Rather, the informant's behavior must be deliberately designed to elicit incriminating remarks in order to establish a sixth amendment violation.[17] In *People v. Whitt*,[18] the court stated that in determining

10. The sixth amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. In Maine v. Moulton, 474 U.S. 159 (1985), the Court held that "The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." *Id.* at 176.

11. 447 U.S. 264 (1980).

12. *Id.* at 274-75.

13. *Id.* at 272-74.

14. Kent, for his own safety, requested a transfer prior to his testifying in the case. The request was granted. However, the court did not regard this as leniency because the length of his sentence was not affected. *Howard*, 44 Cal. 3d at 401, 749 P.2d at 292-93, 243 Cal. Rptr. at 855-56.

15. 477 U.S. 436 (1986).

16. *Id.* at 457.

17. *Id.* *See also* Maine v. Moulton, 474 U.S. at 176-77 (where the court held that the defendant's sixth amendment rights were violated because the government ar-

whether an informant has deliberately elicited an admission from a defendant, the court must focus primarily on the state's conduct rather than on the informant's.[19] In particular, if the state has induced or specifically directed the informant to obtain such incriminating evidence, then there has been a sixth amendment violation.[20] In the present case, the court found that Kent voluntarily informed the authorities of the defendant's admissions and, therefore, his testimony was properly admitted at trial.[21]

B. Instructions Defining Financial Gain

Section 190.2(a)(1) of the Penal Code[22] provides that a murder which is intentional and carried out for financial gain constitutes a special circumstance.[23] The defendant contended that the court erred in refusing to instruct the jury as to the judicial definition of "for financial gain." As authority for his position, the defendant cited *People v. Bigelow*.[24] In *Bigelow*, the court found that a restrictive definition of "for financial gain" was warranted.[25] However, that case involved a murder pursuant to a robbery which also constitutes a special circumstances under 190.2(a)(17)(i).[26] The *Bigelow* court adopted a narrow construction of "for financial gain" because of the distinct possibility that the two special circumstances would overlap.[27] The present case involved only one special circumstance: intentional murder for financial gain. Therefore, the court found it was unnecessary to instruct the jury as to a restrictive definition of "for financial gain."[28]

The defendant also contended that the special circumstance was not applicable in this situation because the agreement he entered into with Lemock provided that he would be compensated for only "roughing up" the victim, not for killing him. The court found this argument to be fallacious since it improperly focused only on the

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ranged to have conversations between the defendant and the informant recorded while the defendant was incarcerated).

18. 36 Cal. 3d 724, 685 P.2d 1161, 205 Cal. Rptr. 810 (1984). *See generally* 19 CAL. JUR. 3D *Criminal Law* § 2203 (Supp. 1987).

19. *Whitt*, 36 Cal. 3d at 741, 685 P.2d at 1170, 205 Cal. Rptr. at 819.

20. *Id.*

21. *Howard*, 44 Cal. 3d at 402, 749 P.2d at 293, 243 Cal. Rptr. at 856.

22. CAL. PENAL CODE § 190.2(a)(1) (West Supp. 1988).

23. *Id.*

24. 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984).

25. *Id.* at 751, 691 P.2d at 1006, 209 Cal. Rptr. at 340.

26. CAL. PENAL CODE § 190.2(a)(17)(i) (West Supp. 1988) (special circumstance will attach when a murder was committed while the defendant was engaged in a robbery).

27. *Bigelow*, 37 Cal. 3d at 751, 691 P.2d at 1006, 209 Cal. Rptr. at 340.

28. *Howard*, 44 Cal. 3d at 409-10, 749 P.2d at 298, 243 Cal. Rptr. at 861-62.

terms of the agreement.[29] Instead, the court stated that: "[t]he special circumstance [enumerated in 190.2(a)(1)] focuses on the defendant's intention *at the time the murder was committed.*"[30] Therefore, since the defendant's actions were done in expectation of receiving financial consideration, it was not relevant that the agreement could have been satisfied even if the murder did not occur.[31]

C. Challenges for Cause During Voir Dire

At voir dire, the trial court granted the prosecution's motion to excuse for cause four veniremen who expressed reluctance regarding their ability to impose the death penalty sentence if warranted. The defendant contended that the motion was improperly granted. In *Witherspoon v. Illinois*[32] and *Wainwright v. Witt*,[33] the United States Supreme Court addressed the issue of excusing prospective jurors in capital cases. Both cases set forth exacting standards as to whether exclusion of a venireman for cause is proper. The *Witherspoon* standard permits exclusion for cause only when a venireman unambiguously states that he will always automatically vote against the death penalty.[34] In the more recent *Witt* decision, the Court reexamined its statements in *Witherspoon* and adopted a more liberal standard: "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' "[35] The Court also stated that it is not necessary to unambiguously prove that the juror is biased against the death penalty because such a determination cannot be definitely made during the voir dire process.[36] Therefore, a court can properly excuse for cause veniremen in a capital case when there is an indication that they will not properly consider both prospective penalties. In the present case, the court found that, based on the responses elicited during voir dire, there was no error in excusing for cause the challenged veniremen under both the *Witherspoon* and *Witt*

29. *Id.* at 409, 691 P.2d at 298, 209 Cal. Rptr. at 861.
30. *Id.* (emphasis in original).
31. *Id.*
32. 391 U.S. 510 (1968). *See generally*, Annotation, *Comment & Note—Beliefs Regarding Capital Punishment as Disqualifying Juror in Capital Case—Post Witherspoon Cases*, 39 A.L.R. 3D 550 (1971 & Supp. 1988) (discussion of post-*Witherspoon* developments in disqualifying jurors in capital cases).
33. 469 U.S. 412 (1985).
34. *Witherspoon*, 391 U.S. at 516 n.9.
35. *Wainwright*, 469 U.S. at 424.
36. *Id.*

standards.[37]

D. Introduction of Additional Evidence at the Penalty Phase

Section 190.3 of the Penal Code[38] states that "no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a *reasonable period* of time as determined by the court, prior to trial."[39] After the guilt phase concluded, the prosecutor informed the court that he intended to present evidence at the penalty phase that was not expressly contained in the pretrial notice. This evidence directly pertained to the defendant's egregious and abusive treatment of women and children.[40] The court permitted the prosecutor to present this additional evidence but only after granting the defendant's request for a three-and-a-half week continuance. The defendant contended that he was given inadequate and untimely notice of the evidence in question.

The court focused on three issues in determining whether the additional evidence was properly admitted: (1) did the prosecutor act in good faith; (2) did counsel have reasonable opportunity to prepare his case; and (3) was the defendant unfairly prejudiced. In examining the issue of good faith, the court noted that the prosecutor did not learn of the existence of the additional information until after the guilty verdict was entered.[41] Therefore, since the evidence was not available to the prosecutor at an earlier date, the court concluded that there was no showing of bad faith.[42] On the issue of reasonable notice, the court held that the three-and-a-half week continuance afforded counsel sufficient opportunity to prepare his case.[43] Also, the court noted that if the defendant believed that the continuance was inadequate, he should have requested additional time.[44]

In determining whether the defendant was unfairly prejudiced by the admission of the additional evidence, the court focused on the nature of the evidence. Defense counsel complained that his strategy as to jury selection and his decision to permit the defendant to testify might have been different if he had been aware of this evidence prior to the commencement of the trial. The court rejected this contention

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37. *Howard*, 44 Cal. 3d at 418, 749 P.2d at 304, 243 Cal. Rptr. at 867.

38. CAL. PENAL CODE § 190.3 (West Supp. 1988).

39. *Id.* (emphasis added). *See generally* 22 CAL. JUR. 3D *Criminal Law* § 3346 (1985).

40. The evidence in question was offered by defendant's ex-wife and former girlfriend. Both testified as to the defendant's violent nature and his abusive treatment of them and their children.

41. *Howard*, 44 Cal. 3d at 423, 749 P.2d at 308, 243 Cal. Rptr. at 871.

42. *Id.*

43. *Id.*

44. *Id.*

based on the fact that the general nature of the additional evidence was similar to other evidence which was contained in the pretrial notice.[45] Specifically, the evidence pertained to the defendant's abusive treatment of women and children. The court believed that from the information contained in the pretrial notice, the defendant should have been aware that the prosecution would present evidence of this egregious behavior.[46] Therefore, the court held that since the nature of the evidence was similar to that contained in the pretrial notice, the defendant was not unfairly prejudiced by its admission.[47]

E. Instructions on Mitigating Factors

It is well established that in a capital case the sentencer must be given the opportunity to consider any relevant mitigating evidence regarding the defendant's character or background.[48] The defendant contended that the court's statements during a sequestered voir dire were improper because the jury was instructed not to consider sympathy during the course of the trial.[49] The court conceded that under an earlier decision, *People v. Brown*,[50] this argument had merit.[51] However, the United States Supreme Court had subsequently reversed the *Brown* decision.[52] In a concurring opinion in *Brown*, Justice O'Connor specifically noted that a reviewing court should examine the jury instructions as a whole and in combination with statements made by the prosecutor during closing arguments to de-

45. *Id.* at 424, 749 P.2d at 308, 243 Cal. Rptr. at 871.

46. The court specifically mentioned items three, four, and five of the pretrial order, which refer to defendant's violent treatment of a former girlfriend and kidnapping of his children. *Id.* at 419-20, 749 P.2d at 305, 243 Cal.Rptr. at 868.

47. *Id.* at 425, 749 P.2d at 308-09, 243 Cal. Rptr. at 872.

48. In Lockett v. Ohio, 438 U.S. 586 (1978), Chief Justice Burger stated that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (emphasis in original). *See generally* Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317 (1981); 22 CAL. JUR. 3D *Criminal Law* § 3345 (1985).

49. The language used by the court was: "These trials always bring out feelings of some sort or the other in the people who hear the evidence, feelings of sympathy or passion or prejudice or whatever. . . . Would you be willing to put such feelings aside and determine the issues just on the evidence?" *Howard*, 44 Cal. 3d at 432, 749 P.2d at 313, 243 Cal. Rptr. at 876.

50. 40 Cal. 3d 512, 726 P.2d 516, 230 Cal. Rptr. 834 (1985), *rev'd sub. nom.* California v. Brown, 107 S. Ct. 837 (1987).

51. *Howard*, 44 Cal. 3d at 432, 749 P.2d at 313, 243 Cal. Rptr. at 877.

52. California v. Brown, 107 S. Ct. 837 (1987).

termine whether the jurors were clearly informed that they could consider any relevant mitigating factor before rendering a sentence.[53] If the jurors were misled into believing that they must ignore relevant mitigating evidence during the penalty stage, then the instructions are improper.[54]

Applying these standards, the court found that the jury was not improperly misled.[55] The jury was specifically instructed that the law does not forbid them from considering pity for the defendant.[56] Also, the prosecutor, during his closing argument, informed the jury that at this stage of the trial they can be influenced by pity in making their determination.[57] Further, the court instructed the jury that "they could consider matters which 'in fairness and mercy' could be found extenuating."[58] Therefore, the court held that the jurors were properly instructed that they could consider mitigating circumstances and pity[59] in determining the appropriate penalty; thus no error occurred.[60]

IV. JUSTICE BROUSSARD'S CONCURRING AND DISSENTING OPINIONS

Justice Broussard's sole disagreement with the majority opinion was its treatment of section 190.2(a)(1). He believed that adopting a dual meaning for the phrase "for financial gain" was undesirable and imprudent.[61] He argued that there was no justification for the majority's position that section 190.2(a)(1) should be construed differently from case to case depending on the charges filed.[62] Instead, Justice Broussard argued that the restrictive construction set forth in *Bigelow* should be uniformly applied in every case because he believed that it properly addressed the problem of overlapping special circumstances and, at the same time, did not prejudice the prosecution.[63]

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53. *Id.* at 842 (O'Connor, J., concurring).

54. *Id.* (O'Connor, J., concurring).

55. *Howard*, 44 Cal. 3d at 432, 749 P.2d at 314, 243 Cal. Rptr. at 877.

56. *Id.*

57. *Id.* at 432-33, 749 P.2d at 314, 243 Cal. Rptr. at 877.

58. *Id.* at 433, 749 P.2d at 314, 243 Cal. Rptr. at 877.

59. The defendant argued that the words pity and sympathy are not essentially the same and, therefore, the jury was not informed that it could consider sympathy. The court summarily dismissed this complaint. *Id.*

60. *Id.*

61. *Id.* at 446, 749 P.2d at 323, 243 Cal. Rptr. at 887 (Broussard, J., concurring and dissenting).

62. *Id.* at 447, 749 P.2d at 324, 243 Cal. Rptr. at 887 (Broussard J., concurring and dissenting).

63. *Id.* at 446, 749 P.2d at 323, 243 Cal. Rptr. at 886-87 (Broussard, J., concurring and dissenting).

V. CONCLUSION

Although the court addressed a myriad of issues, its interpretation of sections 190.2(a)(1) and 190.3 of the Penal Code will probably have the most significant impact on California law. Despite Justice Broussard's insistence, the court is not applying a dual meaning to the phrase "for financial gain" contained in 190.2(a)(1). The phrase does not include technical language and is a matter of common understanding. Therefore, the general rule is that a court is not required to instruct a jury as to the definition of "for financial gain." The *Bigelow* decision should be interpreted as an exception to the general rule that will apply only when the section 190.2(a)(1) special circumstance overlaps with other special circumstances and could result in duplicating aggravating factors. The court's decision to permit a prosecutor to present evidence during the penalty phase that is not specifically enumerated in the pretrial notice under limited circumstances, is consistent with the language contained in section 190.3. The court recognized that admitting such evidence might possibly unfairly prejudice a defendant; therefore, it set forth a three-prong admissibility standard. First, the prosecutor must have acted in good faith. Second, defense counsel must be given reasonable opportunity to prepare the case. Finally, the evidence must be of the same general nature as other evidence contained in the pretrial notice. This standard allows a prosecutor to present relevant evidence that is discovered subsequent to the commencement of the trial at the penalty phase and, at the same time, minimizes the risk of unfair prejudice.

RONALD P. SCHRAMM

B. *Independent felonious intent is not an element of felony-murder special-circumstance. The jury may not be advised as to the consequences of a nonunanimous penalty phase verdict:* **People v. Kimble.**

I. INTRODUCTION

In *People v. Kimble*,[1] the court affirmed the trial court's judgment of guilt and the resulting imposition of the death penalty. The court found the execution of a nighttime search warrant to be proper in

1. 44 Cal. 3d 480, 749 P.2d 803, 244 Cal. Rptr. 148 (1988). Chief Justice Lucas authored the majority opinion with Justices Panelli, Arguelles, Eagleson, and Kaufman concurring. Justices Mosk and Broussard wrote separately, each concurring and dissenting in part.

light of the exigency created by the murder charges. The false statements made by the defendant subsequent to the arrest were properly admitted for the purpose of showing "consciousness of guilt."[2] The court also found that the felony-murder special-circumstance jury instructions were properly given. Although the allegation of two separate multiple-murder special-circumstances was improper, the court found the error to be harmless. The prosecution's incorrect interpretation of former section 190.3(b) of the Penal Code[3] was also held to be harmless error. Finally, the court ruled that the trial court properly responded to jury inquiries pertaining to both the application of section 190.3(b) and the result of a nonunanimous penalty verdict.

II. STATEMENT OF FACTS

After a jury trial, the defendant, Eric Kimble, was found guilty of murder, burglary, robbery, and rape. The jury also found sufficient evidence to support the special-circumstances of robbery felony-murder, rape felony-murder, and multiple murder. The victims' bodies were found in their home with their hands bound and their mouths and eyes taped closed. Each death occurred as a result of a single gun shot and the evidence indicated that the female victim had been raped. That same evening, the victims' stereo store was burglarized. Following tips received from a witness, the police obtained a search warrant for the home of an alleged accomplice to the burglary. During the early morning execution of the warrant, the police found evidence leading to the arrest of the defendant.

In the guilt phase of the trial, the prosecution submitted a tape recording of the false statements made by the defendant subsequent to the arrest. The prosecution charged the defendant with the multiple murder special-circumstance for each of the murders committed. The trial court instructed the jury that a special circumstance could be found if "the murder was committed 'during the commission' of the separate felony."[4] In the penalty phase, the prosecutor failed to present evidence, aside from the charged offenses, showing past violent or forceful criminal behavior by the defendant. During deliberation, the jury submitted a question to the trial court regarding the application of section 190.3. The court responded by rereading the instructions and informing the jury that the penalty determination was not to be based on "personal choice."[5] The jury also submitted a question asking how a nonunanimous verdict would affect the penalty. The court responded that such information was not within the

2. *Id.* at 496, 749 P.2d at 812, 244 Cal. Rptr. at 157.
3. CAL. PENAL CODE § 190.3(b) (West 1988).
4. *Kimble*, 44 Cal. 3d at 499, 749 P.2d at 814, 244 Cal. Rptr. at 160.
5. *Id.* at 507-08, 749 P.2d at 819-20, 244 Cal. Rptr. at 165.

province of the jury.[6]

III. THE MAJORITY OPINION

A. The Guilt Phase

1. The nighttime search warrant was properly executed.

The defendant first argued that the evidence obtained in the search of his accomplice's residence was improperly admitted due to an illegal "nighttime" search.[7] The court rejected this argument as the warrant facially authorized both day and nighttime execution. Based on the principle that daytime service is required absent a showing of "good cause,"[8] the defendant next contended that the affidavits supporting the search warrant failed to meet the standard for nighttime service.[9] The court noted that although a nighttime search is significantly intrusive, such a search is proper in the presence of exigent circumstances.[10] Believing the gravity of the offense and the need for an expedited investigation to constitute the requisite exigency, the court found the warrant to have been properly executed and the trial court to have correctly denied the defendant's suppression motion.[11]

2. The false statements made by the defendant subsequent to arrest were properly admitted.

The defendant next alleged that the trial court improperly admitted into evidence the tape recording of false statements made by the defendant during interrogation. Disagreeing with the defendant, the court observed that although the defendant had not taken the stand, the evidence was properly admitted for the purpose of showing "consciousness of guilt."[12] Based on *People v. Cole*[13] and *People v.*

6. *Id.* at 511, 749 P.2d at 822, 244 Cal. Rptr. at 168.
7. *Id.* at 492-93, 749 P.2d at 809-10, 244 Cal. Rptr. at 155.
8. *Id.* at 493-94, 749 P.2d at 810, 244 Cal. Rptr. at 156 (citing CAL. PENAL CODE §§ 1529, 1533 (West 1982 & Supp. 1988); Solis v. Superior Court, 63 Cal. 2d 774, 776-77, 408 P.2d 945, 946, 48 Cal. Rptr. 169, 170 (1966)).
9. *Kimble*, 44 Cal. 3d at 493, 749 P.2d at 810, 244 Cal. Rptr. at 156.
10. *Id.* at 494, 749 P.2d at 811, 244 Cal. Rptr. at 156 (quoting United States v. Searp, 586 F.2d 1117, 1121 (6th Cir. 1978)). *See generally* 20 CAL. JUR. 3D (REV.) *Criminal Law* § 2530 (1985) (execution of search warrants).
11. *Kimble*, 44 Cal. 3d at 494-95, 749 P.2d at 811, 244 Cal. Rptr. at 156-57.
12. *Id.* at 496, 749 P.2d at 812, 244 Cal. Rptr. at 157. *See also* B. WITKIN, CALIFORNIA EVIDENCE, § 512 (2d ed. 1966).
13. 141 Cal. 88, 89-90, 74 P. 547, 547 (1903) (denial may show intent to steal).

Amaya,[14] the court rejected the defendant's contention that inconsistent trial testimony was required prior to the introduction of the questioned evidence. The court reasoned that like " 'flight and concealment,' "[15] false statements made to the police may create " 'inferences of guilt.' "[16] Concluding that the tape recording was offered only to show that the statements were made, and that the jury would decide the weight to be given such statements, the court held that the tape recording was properly admitted.[17]

3. The jury was correctly instructed on the application of the felony-murder special-circumstance.

The trial court instructed the jury that a felony-murder special-circumstance could be found only if the "murder was committed 'during the commission' of the separate felony."[18] The defendant contended that this instruction was incorrect as it failed to provide the additional clarification of a special-circumstance developed in *People v. Green*[19] and *People v. Thompson*.[20] The court agreed with the defendant that *Green* limits the "in the commission" requirement to situations where the murder occurs in furtherance of a separate crime.[21] The court also agreed with the application of the *Green* test in *Thompson*, where the court found no special circumstance to exist as the evidence was insufficient to establish that the defendant intended to commit a crime separate from murder.[22]

Based on decisions subsequent to *Green* and *Thompson*, however, the court rejected the defendant's contention that these cases required elaboration on the standard special-circumstance instruction.[23] Noting that no decision has required such clarification "regardless of whether the *evidence* supports such an instruction,"[24] the court held

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14. 44 Cal. App. 2d 656, 659, 112 P.2d 942, 944 (1941) (misleading false statements enhance inference of guilt).

15. *Kimble*, 44 Cal. 3d at 497, 749 P.2d at 812, 244 Cal. Rptr. at 158 (quoting *Cole*, 141 Cal. at 89-90, 74 P. at 547).

16. *Kimble*, 44 Cal. 3d at 497, 749 P.2d at 813, 244 Cal. Rptr. at 158 (citing *Amaya*, 44 Cal. 2d at 659, 112 P.2d at 944). *See generally* 17 CAL. JUR. 3D (REV.) *Criminal Law* § 385 (1984) (intent may be inferred from the circumstances of the crime).

17. *Kimble*, 44 Cal. 3d at 498, 749 P.2d at 813, 244 Cal. Rptr. at 159.

18. *Id.* at 499, 749 P.2d at 814, 244 Cal. Rptr. at 160. *See generally* 22 CAL. JUR. 3D (REV.) *Criminal Law* § 3343 (1985 & Supp. 1988) (jury responsibility under special circumstance charge).

19. 27 Cal. 3d 1, 59-62, 609 P.2d 468, 504-06, 164 Cal. Rptr. 1, 37-39 (1980).

20. 27 Cal. 3d 303, 321-25, 611 P.2d 883, 892-95, 165 Cal. Rptr. 289, 298-301 (1980).

21. *Kimble*, 44 Cal. 3d at 500, 749 P.2d at 815, 244 Cal. Rptr. at 160. *See generally* 17 CAL. JUR. 3D (REV.) *Criminal Law* § 217 (1984) (felony-murder rule).

22. *Kimble*, 44 Cal. 3d at 500-01, 749 P.2d at 815, 244 Cal. Rptr. at 161. *See generally* 40 AM. JUR. 2D *Homicide* § 474 (1968) (homicide within the scope of other crime); 17 CAL. JUR. 3D (REV.) *Criminal Law* § 221 (1984) (independent felonious intent).

23. *Kimble*, 44 Cal. 3d at 501, 749 P.2d at 816, 244 Cal. Rptr. at 161.

24. *Id.*

that the given instruction competently described the law to the jury.[25] Recognizing the duty to give an explanatory instruction *sua sponte* when the evidence so requires, the court found no such evidence to exist.[26]

4. The prosecutor's double charging of the multiple murder special-circumstance was harmless error.

Arguing that the error affected both the guilt and penalty phases of the trial, the defendant contended that the prosecution incorrectly attached a multiple murder special-circumstance to both murder charges. While the court agreed that only one charge of multiple murder is allowable, it found the error to be harmless as it was not likely to have affected the jury's decision.[27]

B. The Penalty Phase

1. The prosecutor's incorrect interpretation of former section 190.3(b) of the Penal Code was harmless error.

The defendant next contended that the trial court improperly denied his motion for a mistrial following the prosecutor's misinterpretation of section 190.3(b). Section 190.3 describes the "aggravating and mitigating" circumstances which the jury is to consider in its finding of special circumstances. Subsection (b) includes "the presence or absence of criminal activity by the defendant which involved . . . force or violence."[28]

In the penalty phase summation, the prosecutor maintained that the charged murder was sufficient to meet the 190.3(b) requirements. The court found such a suggestion to be improper as section 190.3(b) is applicable only to violent or forceful criminal activity "*other* than

25. *Id.* at 503, 749 P.2d at 817, 244 Cal. Rptr. at 163. *See generally* 40 AM. JUR. 2D *Homicide* § 491 (1968) (instruction need only be understood by jury).

26. *Kimble*, 44 Cal. 3d at 503, 749 P.2d at 817, 244 Cal. Rptr. at 162-63. *See generally* 17 CAL. JUR. 3D *Criminal Law* § 352 (1984) (jury instruction for felony-murder).

27. *Kimble*, 44 Cal. 3d at 504, 749 P.2d at 817-18, 244 Cal. Rptr. at 163.

28. *Id.* at 504, 749 P.2d at 818, 244 Cal. Rptr. at 163 (quoting CAL. PENAL CODE § 190.3(b) (West 1988)); *see also* Flanagan, *Dark Years on Death Row: Guiding Sentencer Discretion After Zant, Barclay and Harris*, 17 U.C. DAVIS L. REV. 689 (1984) (aggravating circumstances for felony-murder); Comment, *Crimes; Death Penalty*, 5 PAC. L.J. 321 (1974) (special-circumstance requirement and aggravating circumstances). *See generally* 2 B. WITKIN, CALIFORNIA CRIMES, § 1034 (Supp. 1985) (factors to be considered by jury in penalty phase).

the capital offense" charged.[29] However, because the prosecutor's comments were both brief and admissible under section 190.3(a), the court found the error harmless and insufficient to prejudice the jury.[30]

2. The trial court properly responded to the jury's inquiry regarding the application of section 190.3.

After listening to the jury instructions and deliberating for a short time, the jury submitted a question to the trial court inquiring whether there were additional criteria upon which the penalty determination could be based or whether it was a matter of "personal choice."[31] The court reread the instructions and informed the jurors that they were to follow the law and not their "personal choice."[32] The defendant contended that this response was misleading and resulted in the jurors' failure to use their own judgment in determining the proper penalty. The court emphasized that while the reason for the jury's question may have been unclear, the trial court's response was proper in light of the prohibition against the arbitrary and capricious imposition of the death penalty.[33] Reasoning that the trial court's reply would simply prevent the jury from ignoring section 190.3, the court held that no "reasonable jury" would have believed that it was not free to use its "personal choice" in determining the existence of the aggravating or mitigating factors.[34]

3. The jury properly considered the defendant's sympathy evidence.

The defendant next argued that the jury was improperly instructed on the consideration of the defendant's sympathy evidence.[35] After examining the record, the court found no evidence that the jury was misled.[36] The court first noted that the jury was properly instructed in a manner which did not preclude it from considering the sympathy evidence. The court next observed that while it was possible that the instructions were misleading, such a possibility was eliminated by the

29. *Kimble*, 44 Cal. 3d at 505, 749 P.2d at 818, 244 Cal. Rptr. at 164 (citing People v. Miranda, 44 Cal. 3d 57, 105-06, 744 P.2d 1127, 1156-58, 241 Cal. Rptr. 594, 624-25 (1987)).

30. *Kimble*, 44 Cal. 3d at 505-06, 749 P.2d at 819, 244 Cal. Rptr. at 164.

31. *Id.* at 506, 749 P.2d at 819, 244 Cal. Rptr. at 165 (quoting the trial court record) (emphasis omitted).

32. *Id.* at 507-08, 749 P.2d at 820, 244 Cal. Rptr. at 165-66 (quoting California v. Brown, 107 S. Ct. 837, 839 (1987) (citations omitted)). *See generally* 2 B. WITKIN, CALIFORNIA CRIMES § 947L(c) (Supp. 1985) (sentencing may not be arbitrary or capricious).

33. *Kimble*, 44 Cal. 3d at 509, 749 P.2d at 821, 244 Cal. Rptr. at 166.

34. *See generally* 2 B. WITKIN, CALIFORNIA CRIMES, § 947I-1 (Supp. 1985) (exclusion of mitigating circumstances).

35. *Kimble*, 44 Cal. 3d at 509, 749 P.2d at 821, 244 Cal. Rptr. at 167.

36. *Id.* at 510, 749 P.2d at 821, 244 Cal. Rptr. at 167.

prosecutor's direction that the jury consider mercy in light of the facts presented. Analogizing the prosecutor's comments to those legitimized in *People v. Allen*,[37] the court rejected the defendant's allegation.[38]

4. The trial court properly responded to the jury's question regarding a nonunanimous verdict.

The defendant lastly contended that when asked by the jury about the consequences of a nonunanimous penalty verdict, the trial court was under a duty to inform the jury that such a result would yield a life sentence without the possibility of parole. Although *People v. Dixon*[39] expressly requires that the court refrain from informing the jury as to the effect of a nonunanimous verdict, the defendant argued that such a requirement was not controlling in this case. Relying on persuasive authority, the defendant maintained that absent the desired explanation, minority jurors might be swayed in the opposite direction for fear that a new trial may result from a split decision.[40]

The court rejected this argument noting that the defendant's authority was easily distinguished and that a *Dixon*-type rule is controlling in most states.[41] Reasoning that the instruction requested by the defendant would provide jurors with the knowledge that they could exercise a "veto power" over the imposition of the death penalty,[42] the court held that such an instruction is a procedural guideline which is not to be presented to the jury.[43] Thus, the court found that the trial judge properly responded to the jury's inquiry.

IV. THE SEPARATE OPINIONS

A. Justice Mosk's Concurring and Dissenting Opinion

Concurring with the affirmation of the defendant's conviction, Justice Mosk wrote separately to take issue with the majority's holding that the felony-murder special-circumstance jury instruction was properly given.[44] Based on *People v. Green*,[45] Justice Mosk con-

37. 42 Cal. 3d 1222, 1276, 729 P.2d 115, 148, 232 Cal. Rptr. 849, 882-83 (1986).
38. *Kimble*, 44 Cal. 3d at 510, 749 P.2d at 822, 244 Cal. Rptr. at 167-68.
39. 24 Cal. 3d 43, 53, 592 P.2d 752, 758, 154 Cal. Rptr. 236, 242 (1979).
40. *Kimble*, 44 Cal. 3d at 511-12, 749 P.2d at 823, 244 Cal. Rptr. at 168-69.
41. *Id.* at 512-16, 749 P.2d at 823-26, 244 Cal. Rptr. at 169-71.
42. *Id.* at 515-16, 749 P.2d at 825-26, 244 Cal. Rptr. at 171.
43. *Id.*
44. *Id.* at 517, 749 P.2d at 826, 244 Cal. Rptr. at 172 (Mosk, J., concurring and dissenting).

tended that an "independent felonious purpose" is an element of felony-murder special-circumstance[46] and that under *People v. Garcia*,[47] a failure to instruct on such an element is automatically reversible.[48] Carefully scrutinizing the *Garcia* line of cases, Justice Mosk noted three exceptions to the *Garcia* rule, each of which he found inapplicable to the present facts.[49] A fourth exception suggesting that absent adverse evidence, separate felonious intent may be "established as a matter of law,"[50] was not applied as Justice Mosk found insufficient support for its continued use.[51] Believing that federal due process rights would be violated without the felonious intent instruction,[52] the dissenting justice concluded that the failure to provide such an instruction was prejudicial error.[53]

B. Justice Broussard's Concurring and Dissenting Opinion

Concurring with the majority as to the existence of guilt and special-circumstances, Justice Broussard disagreed with the imposition of the death penalty.[54] His dissent first noted that the prosecutor's attempt to use the underlying felonies as aggravating factors under section 190.3(b) was prejudicial error.[55] Justice Broussard believed that the prosecutor's statement created a "substantial possibility" that the jury would place undue weight on the underlying crimes as aggravating circumstances.[56]

Justice Broussard also took issue with the majority's opinion that the trial court properly instructed the jury not to base their penalty

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45. 27 Cal. 3d 1, 61-62, 609 P.2d 468, 505-06, 164 Cal. Rptr. 1, 38-39 (1980).

46. *Kimble*, 44 Cal. 3d at 517, 749 P.2d at 826, 244 Cal. Rptr. at 172 (Mosk, J., concurring and dissenting).

47. 36 Cal. 3d 539, 554, 684 P.2d 826, 834, 205 Cal. Rptr. 265, 273 (1984).

48. *Kimble*, 44 Cal. 3d at 517, 749 P.2d at 827, 244 Cal. Rptr. at 172 (Mosk, J., concurring and dissenting).

49. *Id.* at 526, 749 P.2d at 832, 244 Cal. Rptr. at 178 (Mosk, J., concurring and dissenting). The three exceptions set out in *Garcia* are: (1) the "acquittal exception," which avoids the rule when the error involves a special circumstance found inapplicable; (2) the "concession exception," which avoids the rule when the defendant concedes intent; and, (3) the "*Sedeno* exception" which avoids the rule when the issue is properly resolved in a correct instruction. *Id.* at 518, 749 P.2d at 827, 244 Cal. Rptr. at 172-73 (Mosk, J., concurring and dissenting) (citations omitted).

50. *Id.* at 518, 749 P.2d at 827, 244 Cal. Rptr. at 173 (Mosk, J., concurring and dissenting) (citations omitted).

51. *Id.* at 521, 526, 749 P.2d at 829-30, 244 Cal. Rptr. at 174-78 (Mosk, J., concurring and dissenting).

52. *Id.* at 523-26, 749 P.2d at 831-33, 244 Cal. Rptr. at 176-78 (Mosk, J., concurring and dissenting).

53. *Id.* at 526, 749 P.2d at 833, 244 Cal. Rptr. at 178 (Mosk, J., concurring and dissenting).

54. *Id.* (Broussard, J., concurring and dissenting).

55. *Id.* at 527, 749 P.2d at 833, 244 Cal. Rptr. at 178-79 (Broussard, J., concurring and dissenting).

56. *Id.* at 527, 749 P.2d at 833, 244 Cal. Rptr. at 179 (Broussard, J., concurring and dissenting).

decision on "personal choice."[57] Reasoning that the jury's inquiry was illustrative of its confusions over the factors to be considered in the penalty decision, Justice Broussard found that the response given by the trial court served only to remove the subjectivity from the deliberation process.[58] Based on the belief that "jurors follow the court's instructions," Justice Broussard concluded that the imposition of the death penalty was incorrect.[59]

V. CONCLUSION

People v. Kimble is a message illustrative of the conservative approach currently practiced by the supreme court in the criminal arena. Had this decision come before Chief Justice Bird's court, it is likely that Justice Mosk's dissent would have provided the loophole necessary to reverse the imposition of the death penalty. Undaunted by either Justice Mosk's or Justice Broussard's attempt to finesse a life sentence out of a prototypical felony-murder special-circumstance offense, the majority clearly recognized that the egregious nature of the facts was sufficient to overcome the types of harmless error which previously rendered the death penalty a hollow threat.

STEVEN L. MILLER

C. *Unsolicited testimony provided by a cellmate relating to an offense by a defendant other than the one charged is admissible. Brief prosecutorial comments regarding defendant's silence at trial and impact of death on victim's family constitute harmless error when no corroborating evidence is introduced:* **People v. Hovey.**

I. INTRODUCTION

In *People v. Hovey*,[1] Richard Adams Hovey appealed a first degree murder conviction and death sentence. The defendant alleged preju-

57. *Id.* at 529, 749 P.2d at 834-35, 244 Cal. Rptr. at 180 (Broussard, J., concurring and dissenting).

58. *Id.* at 529-30, 749 P.2d at 835, 244 Cal. Rptr. at 180-81 (Broussard, J., concurring and dissenting).

59. *Id.* at 530, 749 P.2d at 835, 244 Cal. Rptr. at 181 (Broussard, J., concurring and dissenting).

1. 44 Cal. 3d 543, 749 P.2d 776, 244 Cal. Rptr. 121 (1988). Chief Justice Lucas wrote the majority opinion with Justices Panelli, Arguelles, Eagleson, and Kaufman concurring. Justice Mosk and Justice Broussard each wrote separate concurrences.

dicial error in both the guilt and penalty phases of trial. The supreme court rejected all assignments of error.

The court first determined that there was sufficient evidence to sustain the special circumstance finding[2] under *People v. Anderson*.[3] More significantly, the court ruled that the incriminating statements obtained by Hovey's cellmate were admissible since they were not forced and did not pertain to the offense with which Hovey was then charged.[4] The court also decided that the prosecution's comments, including defendant's failure to testify and the impact of the crime on the victim's family, were improper but constituted harmless error because they were inconsequential references without corroborating evidence.[5]

II. FACTUAL BACKGROUND

On March 10, 1978, eight-year-old Tina Salazar was found on a roadside, unconscious and severely injured. The child died from multiple stab wounds eight days later. Witnesses had seen a car in the crime vicinity which was later linked to the defendant. One witness believed he had seen a struggle in the car between a man and child and later chose the defendant's photograph as looking similar to the man.

The defendant was arrested on an unrelated charge. During custody, he made incriminating statements to two cellmates, admitting the abduction and assault of a "Chicano" girl. One of the cellmates then reported the conversations to police officers. The cellmate was instructed to listen to the defendant but not to elicit statements from him. The defendant was later charged with the kidnapping and murder of Salazar.

The defendant, prior to trial, made a stipulation in which he admitted abducting the victim and performing the act which led to her

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2. A death sentence requires a finding of special circumstances. One of these is that the murder was willful, deliberate, and premeditated (first degree) and was committed during a kidnapping. CAL. PENAL CODE § 190.2(a)(17)(ii) (West Supp. 1988). *See* People v. Hoban, 176 Cal. App. 3d 255, 221 Cal. Rptr. 626 (1985) (evidence showing that defendant had not decided to kill victim until after abduction supported finding that murder occurred during course of kidnapping and thus was a special circumstance). *But see* People v. Weidert, 39 Cal. 3d 836, 705 P.2d 380, 218 Cal. Rptr. 57 (1985) (kidnapping was merely incidental to murder when defendant's purpose was to kill victim and thus did not support special circumstance finding).

3. 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968). The court espoused a three-part test to establish premeditation and deliberation. *Id.* at 26-27, 447 P.2d at 949, 73 Cal. Rptr. at 557.

4. Hovey was arrested and in custody on unrelated charges at that time. Although he was a suspect in the Salazar killings, no charges had been brought in relation to that incident at the time the convictions in question took place. People v. Hovey, 44 Cal. 3d 543, 561, 749 P.2d 776, 785, 244 Cal. Rptr. 121, 130 (1988).

5. 44 Cal. 3d at 580, 749 P.2d at 797, 244 Cal. Rptr. at 142.

death. This stipulation was made to prevent admissibility during the guilt phase of a subsequent child kidnapping which had been deemed relevant on the issue of identity.[6] One of the cellmates was unavailable and his preliminary hearing testimony was read to the jury.

At trial, the jury returned a verdict of guilty. During the penalty phase, the subsequent child kidnapping conviction was introduced. The defendant brought in evidence to attest to his good character. On rebuttal, the prosecution provided indications of bad character, including the defendant's reading of child pornography. The prosecutor also briefly mentioned, during closing argument, the defendant's failure to testify and the impact of death on the victim's family. The jury chose the death penalty and sentence was so imposed. This appeal was automatic.[7]

III. THE MAJORITY OPINION

A. Special Circumstances Finding

The defendant's first contention was that the evidence was insufficient to establish premeditation and thus, the special circumstances finding was improper. Rejecting this, the court analyzed the evidence under the *Anderson* test which defendant claimed was unsatisfied.[8] The court found substantial evidence of planning, motive, and manner as required under the three-part test.[9]

B. Cellmate Testimony

The defendant also objected to the reading of the preliminary hearing testimony of cellmate, Donald Lee, as violative of the fifth and sixth amendments.[10] The court adopted the analysis of *Kuhlmann v. Wilson*,[11] which stated that merely listening and reporting statements made by a defendant without eliciting such information does not violate the fifth and sixth amendments.[12] The court determined

6. The trial court had previously ruled as to admissibility of the subsequent offense for a limited purpose. *Id.* at 566, 749 P.2d at 788, 244 Cal. Rptr. at 133.

7. *See* CAL. PENAL CODE § 1239(b) (West Supp. 1988).

8. *Id.* at 556, 749 P.2d at 781, 244 Cal. Rptr. at 126.

9. *Id.* at 556-57, 749 P.2d at 781-82, 244 Cal. Rptr. at 126-27. The court explained that a conviction will be sustained if (1) there is evidence of all three elements; (2) there is "extremely strong" evidence of planning; or (3) there is evidence of motive and either planning or manner which "indicates a preconceived design to kill." *Id.* at 556, 749 P.2d at 781, 244 Cal. Rptr. at 126.

10. U.S. CONST. amend. V; U.S. CONST. amend. VI.

11. *Id.* at 558-59, 561, 749 P.2d at 783, 785, 244 Cal. Rptr. at 128, 130.

12. *Id.* at 559, 749 P.2d at 783, 244 Cal. Rptr. at 129. *See* United States v. Henry,

that Lee was not a paid informant and that he had not been instructed to question the defendant.[13] Lee had simply been asked to report on any statements made by the defendant and thus, was a "passive listener."[14] In *People v. Whitt*,[15] however, a case which preceded *Kuhlmann*, this court held to the contrary: telling the informant to "listen but don't ask" did not prevent a violation.[16] However, the court in *Whitt* found no violation as the police had not created sufficient incentive for the cellmate to become a police "agent."[17] Therefore, although *Kuhlmann* and this case modifies dicta in *Whitt*, that portion was not central to the holding in the instant case.

The court also emphasized that the information pertaining to the Salazar murder had been received before the defendant had been charged with that crime.[18] The sixth amendment right to counsel and the fifth amendment protection against self-incrimination had not yet attached in relation to the Salazar incident.[19] The court distinguished *Maine v. Moulton*, which held that information obtained on a charged offense while investigating an uncharged offense was inadmissible.[20] The facts were the opposite in *Hovey* and thus led to an opposite result.

The defendant's next allegation of error with regard to Lee's testimony was that the prosecution failed to adequately pursue the witness for in court testimony. The court, however, determined that regardless of whether an abuse of discretion[21] or an independent review test[22] was used, the trial court's decision should be upheld.

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447 U.S. 264 (1980) (deliberately elicited statements found to be violation of sixth amendment).

13. 477 U.S. 436 (1986) (prisoner had agreement with police to reveal unsolicited statements). *See generally* Note, *Sixth Amendment—Right to Counsel: Limited Postindictment Use of Jailhouse Informants is Permissible*, 77 J. CRIM. L. & CRIMINOLOGY 743 (1986).

14. *Hovey*, 44 Cal. 3d at 561-62, 749 P.2d at 784-85, 244 Cal. Rptr. at 130. *Contra* People v. Whitt, 36 Cal. 3d 724, 685 P.2d 1161, 205 Cal. Rptr. 810 (1984) (advising informant to listen but not ask questions constitutes a constitutional violation; police created a situation likely to elicit incriminating response).

15. 36 Cal. 3d 724, 685 P.2d 1161, 205 Cal. Rptr. 810 (1984).

16. *Id.* at 741-42, 685 P.2d at 1171, 205 Cal. Rptr. at 820.

17. *Id.* at 744-46, 685 P.2d at 1173-74, 205 Cal. Rptr. at 822-23.

18. *Hovey*, 44 Cal. 3d at 561, 749 P.2d at 785, 244 Cal. Rptr. at 130. Hovey was arrested and in custody on unrelated charges at that time. No charges with regard to the present case had been filed.

19. *Id.* *See* Maine v. Moulton, 474 U.S. 159, 180 n.16 (1985) (sixth amendment does not apply to statements pertaining to other crimes which are not yet charged).

20. 474 U.S. 159 (1985).

21. *See* People v. Enriquez, 19 Cal. 3d 221, 561 P.2d 261, 137 Cal. Rptr. 171 (1977) (trial court's ruling will not be overturned absent an abuse of discretion).

22. *See* People v. Louis, 42 Cal. 3d 969, 728 P.2d 180, 232 Cal. Rptr. 110 (1986) (independent review suggested for due diligence but not paramount to holding).

C. Harmless Errors

The defendant first objected to the trial court's ruling as to relevance of the subsequent child kidnapping. The trial court's determination led to the defendant's stipulation of identity to prevent the admission of the prejudicial evidence.[23] The court acknowledged that the abuse of discretion issue, with regard to relevance of the subsequent kidnapping to identity, was close.[24] However, the court maintained that the abundance of other evidence establishing identity made any possible error harmless beyond a reasonable doubt.[25]

The admission of the subsequent child kidnapping during the penalty stage was also questioned. The court decided that under the 1977 death penalty law,[26] there was no limitation on the admissibility of evidence of prior criminal activity[27] and that there was no sound reason for such a limitation.[28]

The defendant next contended that admission of the victim's photograph in both the guilt and penalty phases was prejudicial error—done only to evoke sympathy from the jurors. The court commented that use of photographs to elicit sympathy should be discouraged.[29] However, the court went on to conclude that any error was harmless, calling the photos "just an ordinary head and shoulders portrait."[30]

The prosecution also dramatized the effect of the victim's death on

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23. *Hovey*, 44 Cal. 3d at 566, 749 P.2d at 788, 244 Cal. Rptr. at 133.

24. *Id.* at 568, 749 P.2d at 789, 244 Cal. Rptr. at 135. Evidence of other crimes is admissible to show identity when there are "common marks which . . . support the strong inference that the current crime bears [defendant's] signature." People v. Alcala, 36 Cal. 3d 604, 632, 685 P.2d 1126, 1141, 205 Cal. Rptr. 775, 790 (1984). The defense correctly pointed out, however, that several of the prosecution's "common marks" were common to many child molesters and further, that there existed substantial dissimilarities between the two crimes. *Hovey*, 44 Cal. 3d at 569, 749 P.2d at 790, 244 Cal. Rptr. at 135.

25. 44 Cal. 3d at 569, 749 P.2d at 790, 244 Cal. Rptr. at 135. The court further noted that in order for a defendant to appeal the admissibility of prior conviction testimony, the defendant must have taken the stand and been impeached. The defendant instead stipulated on the identity issue, thus his claim may have been waived. *See* People v. Collins, 42 Cal. 3d 378, 383-88, 722 P.2d 173, 176-79, 228 Cal. Rptr. 899, 902-05 (1986).

26. Defendant was sentenced under 1977 death penalty law and thus its language is applicable. *Hovey*, 44 Cal. 3d at 577, 749 P.2d at 796, 244 Cal. Rptr. at 141.

27. *Id.* at 577-79, 749 P.2d at 795-96, 244 Cal. Rptr. at 141-42. In fact, the court stressed that even under 1988 death penalty law, violent crimes were admissible whether or not they were prior convictions. *See also* People v. Balderas, 41 Cal. 3d 144, 201-04, 711 P.2d 480, 513-15, 222 Cal. Rptr. 184, 217-19 (1985); 22 CAL. JUR. 3D *Criminal Law* § 3346 (1985).

28. *Hovey* at 577-79, 749 P.2d at 795-96, 244 Cal. Rptr. at 141-42.

29. *Hovey*, 44 Cal. 3d at 576, 749 P.2d at 795, 244 Cal. Rptr. at 140.

30. *Id.* at 571, 749 P.2d at 791, 244 Cal. Rptr. at 137. The court distinguished cases with photographs of victims while alive when the photograph was irrelevant to the is-

her parents during the penalty phase.[31] The defendant claimed a violation of *Booth v. Maryland*.[32] The court, however, distinguished *Booth* where considerable testimony was given on the actual effect on the parents' lives.[33] Here, the court opined that the prosecutor's statements were "already obvious to any juror,"[34] and that the effect mentioned simply compared defendant's treatment of the victim with her family's loving treatment. The court held this to be harmless error if *Booth* applied at all.[35]

The final alleged violation was under *Griffin v. California*[36] as the prosecution, during closing, made indirect remarks on the defendant's failure to testify.[37] The court acknowledged that indirect remarks could constitute a violation.[38] However, they stressed that "brief and mild references . . . without any suggestion that an inference of guilt be drawn" equaled harmless error.[39] The court ruled that the remarks made were in this latter class, and thus were harmless beyond a reasonable doubt.[40]

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sues in the case. *See, e.g.*, People v. Hendricks, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987); People v. Watson, 46 Cal. 2d 818, 299 P.2d 243 (1956).

31. *Hovey*, 44 Cal. 3d at 577, 749 P.2d at 795, 244 Cal. Rptr. at 140-41. The prosecutor stated such things as "[w]ho else is the victim in this case? The parent of that child." and "[t]hink that the next time you see that child she's in the hospital and she doesn't talk to you and she never talks to you again." *Id.* at 577, 749 P.2d at 795, 244 Cal. Rptr. at 140.

32. 107 S. Ct. 2529 (1987) (testimony of impact from death disallowed).

33. *Hovey*, 44 Cal. 3d at 577, 749 P.2d at 795, 244 Cal. Rptr. at 141.

34. *Id.*

35. *Id.*

36. 380 U.S. 609 (1965) (comments on defendant's failure to testify constitute a violation of privilege against self-incrimination). *See generally* J. LAWLESS, PROSECUTORIAL MISCONDUCT § 9.16 (1985) (discussing prosecutorial remarks on defendant's failure to testify and silence).

37. While commenting on testimony stating defendant used a knife, the prosecutor said, "[h]e's never told you anything different." 44 Cal. 3d at 572, 749 P.2d at 792, 244 Cal. Rptr. at 137. And referring to the stipulation, the prosecutor said "he's never said anything to you about why, why he did these things." *Id. But see* United States v. Rodriguez, 627 F.2d 110, 113-14 (7th Cir. 1980) (statement that defendant "has been very quiet" sufficient to infer guilt and constitute a violation); State v. Macomber, 18 Or. App. 163, 168, 524 P.2d 574, 576 (1974) ("Ask the defendant to explain these things" equals inference of guilt). *See generally* B. GERSHMAN, PROSECUTORIAL MISCONDUCT § 10.3(a) (1987) (discussing violation of defendant's privilege against self-incrimination).

38. *Hovey*, 44 Cal. 3d at 572, 749 P.2d at 792, 244 Cal. Rptr. at 137. *See also* United States v. Hasting, 461 U.S. 499, 508 n.6 (1983) (test is whether it is "manifestly intended" or would "naturally and necessarily" be understood by jury to be comment on failure to testify); People v. Jackson, 28 Cal. 3d 264, 304, 618 P.2d 149, 169, 168 Cal. Rptr. 603, 623 (1980).

39. *Hovey*, 44 Cal. 3d at 572, 749 P.2d at 792, 244 Cal. Rptr. at 137. *See also Jackson*, 28 Cal. 3d at 305, 618 P.2d at 169, 168 Cal. Rptr. at 623; People v. Vargas, 9 Cal. 3d 470, 478-81, 509 P.2d 959, 964-66, 108 Cal. Rptr. 15, 20-22 (1973). *See generally* B. GERSHMAN, PROSECUTORIAL MISCONDUCT § 10.3(a) (1987).

40. *See* 21A AM. JUR. 2D *Criminal Law* § 705, at n.30 (1981).

IV. THE SEPARATE OPINIONS

Justice Mosk wrote a separate concurrence. He wished to delineate the point at which a series of harmless errors becomes prejudicial. Although he agreed with the majority's determination of each contention being harmless, he felt their collective effect needed to be addressed.[41]

Particularly troublesome to Justice Mosk was the potential *Booth* violation from commenting on the effect of death on the victim's family. However, the fact that no evidence was offered to corroborate the statements supported a finding of no violation.[42]

V. CONCLUSION

Clearly, there were errors in this case. In fact, at least three errors were conceded by the court. Justice Mosk's concern, then, is well taken. By individually rationalizing each error as harmless, the court neglected to look at the whole picture, and neglected to determine whether, cumulatively, these errors were harmless beyond a reasonable doubt.[43]

However, in this particular case, absent errors, the evidence probably would have supported a conviction. A judgment should not be reversed when there exists substantial evidence of guilt.[44] In the instant case, such evidence renders the errors merely technical in nature and they should probably not be allowed to overturn the conviction.

LESLIE GLADSTONE

41. *Hovey*, 44 Cal. 3d at 586, 749 P.2d at 801, 244 Cal. Rptr. at 147 (Mosk, J., concurring).

42. *Id.* at 587, 749 P.2d at 802, 244 Cal. Rptr. at 147 (Mosk, J., concurring).

43. *See* Chapman v. California, 386 U.S. 18, 24 (1967) (analysis of harmless error doctrine).

44. B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Reversible Error* § 753 (1963). *See also* Annotation, 24 A.L.R. 3D 1104-08 (1969) (examples of cases where error held prejudicial and harmless).

D. *A trial court has broad discretion in denying a severance motion; if the evidence from the separate charges is cross admissible then the trial judge did not abuse this discretion:* **People v. Ruiz.**

I. INTRODUCTION

In *People v. Ruiz*,[1] the California Supreme Court affirmed both the conviction and the death penalty sentence imposed upon the defendant for the murder of his two former wives and his stepson.[2] The court addressed numerous contentions raised by the defendant pertaining to both the guilt phase and the penalty phase of the trial. Most significantly, the court held that a trial court has broad discretion in determining whether separate murder counts should be severed[3] and such a determination can only be reversed if the defendant can establish that clear and substantial prejudice resulted from denial of a severance motion.[4] The court also determined that if the evidence presented at the trial of each of the joined charges would be cross admissible at separate trials, then the requisite prejudice cannot be inferred.[5] The court refused to follow authority from other jurisdictions and reaffirmed its previous holding that sequestration of the jury in a capital case is not required,[6] but is within the sound discretion of the trial judge.[7] Finally, the court held that a trial court is not required to affirmatively instruct a jury that an anti-sympathy instruction given during the guilt phase is not applicable in determining the appropriate sentence in the penalty phase.[8]

II. STATEMENT OF FACTS

In 1972, the defendant, Alejandro Gilbert Ruiz, married his third wife, Tanya. The two had a seemingly unhappy marriage[9] and then, in August 1975, Tanya mysteriously disappeared. Not only did she disappear from her residence, but she also ceased communication with her friends, relatives, and doctors. Mrs. Ruiz's failure to contact her physician, Dr. Shields, after her disappearance was especially significant because she needed professional treatment for cerebral palsy

1. 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988). Chief Justice Lucas wrote the majority opinion with Justices Mosk, Panelli, Arguelles, Eagleson and Kaufman concurring. Justice Broussard authored a concurring and dissenting opinion.
2. *Id.* at 599, 749 P.2d at 857, 244 Cal. Rptr. at 203.
3. *Id.* at 607, 749 P.2d at 862, 244 Cal. Rptr. at 208.
4. *Id.* at 605, 749 P.2d at 860, 244 Cal. Rptr. at 206.
5. *Id.* at 605, 749 P.2d at 860-61, 244 Cal. Rptr. at 206.
6. *Id.* at 616-17, 749 P.2d at 868, 244 Cal. Rptr. at 214.
7. *Id.* at 616, 749 P.2d at 868, 244 Cal. Rptr. at 214.
8. *Id.* at 623-24, 749 P.2d at 872-73, 244 Cal. Rptr. at 218-19.
9. Although there is some contradictory evidence, the victim's mother claims her daughter told her that she was scared of the defendant, especially his "terrible temper." *Ruiz*, 44 Cal. 3d at 600, 749 P.2d at 857, 244 Cal. Rptr. at 203.

and epilepsy. Furthermore, had Mrs. Ruiz contacted another medical doctor, her physician would have been notified.[10]

Other circumstantial evidence indicated that the victim was most probably dead. At the time of her disappearance the victim was receiving Medi-Cal and Social Security benefits. After she disappeared, no request was made to continue these payments.[11] Tanya was a Mormon and after her disappearance, she failed to contact any other Mormon ward to continue practicing her faith.[12] Finally, many of the victim's personal belongings remained at her residence after she disappeared.[13]

There was significant circumstantial evidence to indicate that the defendant murdered the victim. The defendant told the victim's friends and relatives, as well as the police, conflicting and unsubstantiated stories relating to the victim's disappearance.[14] On numerous occasions the victim had told her mother and stepfather that she was afraid of the defendant and that he had a terrible temper.[15] Finally, the defendant failed to legally divorce the victim prior to his marriage to his fourth wife.[16]

However, the defendant was not charged with the murder of Tanya Ruiz until 1979, when the police located the bodies of Pauline Ruiz and Tony Mitchell who had also mysteriously disappeared. Pauline Ruiz was the defendant's fifth wife, and Tony Mitchell was her son from a previous marriage. In October 1978, the two disappeared.[17] Pauline also told her friends that she feared the defendant and expressed her belief that the defendant wanted to kill her.[18]

The bodies of the two victims were located in a shallow grave near the defendant's home. An autopsy revealed that both victims were shot at close range by a Marlin rifle. The police discovered a Marlin

10. The victim wore a medi-alert bracelet which identified her ailments and the name of her treating physician. Dr. Shields testified that if she did relocate, her new physician would contact him and request all relevant medical data pertaining to the victim. *Id.* at 601, 749 P.2d at 858, 244 Cal. Rptr. at 204.

11. *Id.*

12. According to the victim's pastor, if she had contacted any other Mormon ward he would have been notified. *Id.*

13. *Id.*

14. *Id.* at 600-01, 749 P.2d at 858, 244 Cal. Rptr. at 203-04.

15. *Id.* at 600, 749 P.2d at 857-58, 244 Cal. Rptr. at 203. This testimony was later held to be improperly admitted into evidence. *See supra* notes 35-42 and accompanying text.

16. *Id.* at 601, 749 P.2d at 858, 244 Cal. Rptr. at 204. The court found this to be significant because he had divorced his previous two wives. *Id.*

17. *Id.* at 602, 749 P.2d at 859, 244 Cal. Rptr. at 204-05.

18. *Id.* at 602, 749 P.2d at 859, 244 Cal. Rptr. at 204.

rifle in the defendant's home during their investigation.[19] Furthermore, a microscopic comparison of the rope used to bind Tony's body and the rope found in the defendant's house revealed that the two ropes may have originated from the same skein.[20]

The defendant was subsequently charged with the murders of Tanya Ruiz, Pauline Ruiz, and Tony Mitchell. At trial, the jury found the defendant guilty of first degree murder as to Pauline and Tony and guilty of second degree murder as to Tanya. The jury found that the murders of Pauline and Tony involved special circumstances because they were accompanied by another first or second degree murder[21] and they imposed the death penalty sentence upon the defendant.[22] The defendant was therefore automatically entitled to his appeal under section 1239(b) of the Penal Code.[23]

III. MAJORITY OPINION

The majority addressed several of the defendant's contentions including (1) whether the defendant's severance motion was improperly denied; (2) whether the admission of evidence of the victims' fear of the defendant constituted prejudicial error; (3) whether there was sufficient evidence to convict the defendant of the murder of Tanya Ruiz; (4) whether the trial judge improperly denied the defendant's motion to sequester the jury; and (5) whether it was erroneous for the trial judge not to affirmatively instruct the jury that a prior antisympathy instruction was not applicable in the penalty phase.

A. Denial of Severance Motion

Section 954 of the Penal Code[24] provides that: "An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated."[25] The defendant contended that although the court had a statutory right to invoke the aforementioned joinder provision, it should have granted his motion to sever the Tanya Ruiz murder count from the other counts to avoid undue prejudice. The defendant expressly argued that permitting all

19. *Id.* at 603, 749 P.2d at 859-60, 244 Cal. Rptr. at 205.
20. *Id.* at 603, 749 P.2d at 860, 244 Cal. Rptr. at 205.
21. *Id.* at 604, 749 P.2d at 860, 244 Cal. Rptr. at 205.
22. *Ruiz*, 44 Cal. 3d at 604, 749 P.2d at 860, 244 Cal. Rptr. at 206.
23. CAL. PENAL CODE § 1239(b) (West Supp. 1988). This statute provides that "upon . . . a judgment of death . . . an appeal is automatically taken by the defendant without any action taken by him or his counsel." *Id.*
24. CAL. PENAL CODE § 954 (West 1985).
25. *Id.*

counts to be joined created a spillover effect, whereby evidentiary weaknesses in the Tanya Ruiz case were fortified by evidence from the other two murders.

The court first noted that the trial judge has very broad discretion in determining whether to sever a case.[26] The court, relying on case precedents, held that a defendant must prove that clear or substantial prejudice resulted from the trial judge's refusal to grant a severance motion in order to establish abuse of discretion.[27] The court unequivocally held that an assertion of prejudice by a defendant is insufficient to meet the burden of proof required to establish abuse of discretion.[28]

In its determination of whether substantial prejudice resulted from joinder of all three murder counts in the present case, the court primarily addressed the issue of cross admissibility of the evidence. The rule of law followed by the court indicated that prejudice cannot be inferred where evidence relating to each of the joined charges would have been admissible under Evidence Code section 1101, if the defendant was tried separately for each charge.[29] The court held that because of the similarities between the two sets of murder charges, the evidence produced at trial, especially pertaining to the issue of the identity of the murderer, was cross admissible.[30]

The court next held that the lack of direct evidence to even charge the defendant with Tanya's murder, until the discovery of the bodies from the second set of murders, was an important reason to permit joinder in this case.[31] The court noted that the defendant's murder

26. *Ruiz*, 44 Cal. 3d at 606, 749 P.2d at 861, 244 Cal. Rptr. at 207.

27. *Id. See* People v. Balderas, 41 Cal. 3d 144, 170-73, 711 P.2d 480, 491-94, 222 Cal. Rptr. 184, 195-97 (1984) (where the defendant could not establish clear or substantial prejudice, the court held the trial court was correct in denying a motion to sever); Williams v. Superior Court, 36 Cal. 3d 441, 452, 683 P.2d 699, 706, 204 Cal. Rptr. 700, 707 (1984) (where the court stated that substantial prejudice may warrant severance).

28. *Ruiz*, 44 Cal. 3d at 605, 749 P.2d at 860-61, 244 Cal. Rptr. at 206.

29. *Id.* at 605, 479 P.2d at 861, 244 Cal. Rptr. at 206 (quoting *Balderas*, 41 Cal. 3d at 171-72, 711 P.2d at 493, 222 Cal. Rptr. at 196); *see* CAL. EVID. CODE § 1101 (West 1966). It is important to note that although the court, in the present case, focused upon the issue of cross admissibility to determine whether substantial prejudice resulted from denial of the severance motion, the court stated that even if the evidence had not been cross admissible, the trial judge might still not have abused his discretion in denying the severance motion. *Ruiz*, 44 Cal. 3d at 606, 749 P.2d at 861, 244 Cal. Rptr. at 207.

30. *Ruiz*, 44 Cal. 3d at 605-06, 749 P.2d at 861, 244 Cal. Rptr. at 206-07. The court indicated that the fact that both Tanya and Pauline were the defendant's former wives and they both disappeared under suspicious circumstances was relevant in determining the cross admissibility issue. *Id.* at 605-06, 749 P.2d at 861, 244 Cal. Rptr. at 207.

31. *Id.* at 606, 749 P.2d at 861, 244 Cal. Rptr. at 207.

of Pauline and Tony was extremely relevant in determining whether he was responsible for Tanya's death.[32] At trial, the jury found the defendant guilty of second degree murder for Tanya's death, whereas the defendant was convicted of first degree murder for the other two murders. From this, the court adduced that the jury could differentiate between the two sets of murders and the improper spillover effect which the defendant complained did not exist.[33] Therefore, the court held that substantial prejudice did not accrue from the joinder of the two sets of murder counts and the trial judge did not abuse his discretion in denying the defendant's severance motion.[34]

B. Admissibility of Evidence of the Victim's Fear of the Defendant

During the course of the trial, the trial judge admitted into evidence testimony from the victims' friends and relatives concerning statements made by the victims in which they expressed their fear of the defendant. The trial judge ruled that based on the holding in *People v. Merkouris*,[35] these out-of-court statements made by the victims were admissible for the limited purposes of establishing the declarants' state of mind and establishing motive for the murders.[36] However, section 1250(b) of the Evidence Code,[37] which was enacted subsequent to the *Merkouris* decision, expressly prohibits the admissibility of such testimony.[38] The comments to section 1250(b) specifically state that "[t]he doctrine of the *Merkouris* case is repudiated in section 1250(b) because that doctrine undermines the hearsay rule itself."[39]

The court acknowledged that under section 1250(b) and the cases that have followed, out-of-court statements indicating fear of an accused are generally not admissible.[40] Therefore, the court held that the trial court was incorrect in relying on *Merkouris*, and erred in ad-

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32. *Id.*

33. *Id.* at 607, 749 P.2d at 862, 244 Cal. Rptr. at 207. The court, however, noted that "[i]f the evidence were indeed cross-admissible, as we have concluded, then any spillover effect would have been entirely proper." *Id.*

34. *Id.* at 607, 749 P.2d at 862, 244 Cal. Rptr. at 208.

35. 52 Cal. 2d 672, 344 P.2d 1 (1959).

36. *Ruiz*, 44 Cal. 3d at 607-08, 749 P.2d at 862, 244 Cal. Rptr. at 208.

37. CAL. EVID. CODE § 1250(b) (West 1966).

38. *Id.*

39. CAL. EVID. CODE § 1250(b) comment, Assembly Comm. on Judiciary (West 1966).

40. *Ruiz*, 44 Cal. 3d at 608, 749 P.2d at 862-63, 244 Cal. Rptr. at 208. The court recognized that only when there is a dispute as to whether the victim's conduct was in conformity with the fear expressed in out-of-court statements, would such statements be admissible. However, this exception did not apply to the present case. *Id.* at 608, 749 P.2d at 863, 244 Cal. Rptr. at 208-09. *See* People v. Armendariz, 37 Cal. 3d 573, 586, 693 P.2d 243, 251, 209 Cal. Rptr. 664, 672 (1984) (victim's out-of-court statements of fear of an accused when victim's conduct in conformity with that fear is in dispute is admissible); People v. Arcega, 32 Cal. 3d 504, 526-27, 651 P.2d 338, 350, 186 Cal. Rptr. 94, 106

mitting the testimony into evidence.[41] The court also held that, because the evidence was admitted for only very limited purposes and that it was reasonably probable that the jury's verdict would not have been different if the evidence was found inadmissible at trial, the error was harmless.[42]

C. Sufficiency of Evidence to Establish Tanya's Murder

The defendant contended that the evidence offered by the prosecution was insufficient to both establish the corpus delicti and support his conviction for the murder of Tanya Ruiz. California law provides that the corpus delicti may be established by circumstantial evidence.[43] The court concluded that the evidence presented by the prosecution, which included her abrupt disappearance, her total cessation of all communication, her failure to seek resumption of Medi-Cal and Social Security payments, and the fact that her body was never found, created a reasonable inference that her death could have been caused by a criminal agency.[44] The court therefore held that the corpus delicti was sufficiently established.[45]

The court next addressed the issue of sufficiency of evidence to support the defendant's murder conviction. The standard of review in capital cases is whether, from the evidence presented, any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.[46] The evidence presented must be substantial, credible, and of solid value in order to affirm a conviction for murder.[47] Although the court acknowledged that a close question existed as to whether the evidence proffered on this issue was substantial, it did determine that, from the evidence presented, it was reasonable

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(1982) (statement of declarant's then-existing mental state is admissible if the declarant's state of mind is at issue or is relevant to prove acts or conduct of the declarant).

41. *Ruiz*, 44 Cal. 3d at 609, 749 P.2d at 863, 244 Cal. Rptr. at 209.

42. *Ruiz*, 44 Cal. 3d at 609-10, 749 P.2d at 863-64, 244 Cal. Rptr. at 209-10.

43. *Id.* at 610, 749 P.2d at 864, 244 Cal. Rptr. at 210. *See* People v. Alcala, 36 Cal. 3d 604, 624-25, 685 P.2d 1126, 1136, 205 Cal. Rptr. at 775, 784 (1984) (circumstantial evidence is sufficient to establish the corpus delicti).

44. *Ruiz*, 44 Cal. 3d at 610-11, 749 P.2d at 863, 244 Cal. Rptr. at 210. *See* People v. Towler, 31 Cal. 3d 105, 117, 641 P.2d 1253, 1256, 181 Cal. Rptr. 391, 396 (1982) (introduction of evidence creating reasonable inference that death could have been caused by criminal agency satisfies corpus delicti rule).

45. *Ruiz*, 44 Cal. 3d at 610-11, 749 P.2d at 864, 244 Cal. Rptr. at 210.

46. *Id.* at 611, 749 P.2d at 864-65, 244 Cal. Rptr. at 210. *See* People v. Towler, 31 Cal. 3d 105, 117-18, 641 P.2d 1253, 1257, 181 Cal. Rptr. at 391, 397 (1982). Sufficient evidence has been presented if "a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." *Id.* (citation omitted).

47. *Ruiz*, 44 Cal. 3d at 611, 749 P.2d at 864-65, 244 Cal. Rptr. at 210.

for the jury to reach a guilty verdict against the defendant for the murder of Tanya Ruiz.[48]

D. Motion to Sequester the Jury

The defendant contended that the court improperly denied his motion to sequester the jury. The defendant believed that certain news articles pertaining to his case and other capital cases might adversely affect the jury. Relying on statutory authority[49] and three lower court decisions,[50] the court held that the determination of whether a jury must be sequestered is within the sound discretion of the trial court.[51] The court rejected the defendant's argument that sequestration should be required in every capital case.[52] The court reasoned that a mandatory sequestration rule would violate the express language of section 1121 of the Penal Code.[53]

The court noted that the trial court took extreme precautions to ensure that the jury would not be prejudiced by outside sources or influences. In particular, the trial court admonished the jury not to read any newspaper articles pertaining to the present case and it permitted the defense counsel to take the jury on voir dire prior to the penalty phase to determine if the jurors were affected by outside sources. The court followed the rule that denial of a motion to sequester is proper unless the defendant demonstrates that the trier of fact was actually prejudiced by outside sources or pretrial publicity.[54] The court held that the defendant failed to meet this burden.[55]

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48. The evidence that the court found to be most probative on this issue included the victim's mysterious disappearance, the fact that the defendant failed to divorce the victim before he remarried and the cross-admissible evidence pertaining to the other two murders. *Id.* at 611, 749 P.2d at 865, 244 Cal. Rptr. at 210-11.

49. CAL. PENAL CODE § 1121 (West 1985).

50. People v. Manson, 71 Cal. App. 3d 1, 27, 139 Cal. Rptr. 275, 288 (1977) (sequestration of a jury rests on the sound discretion of trial court); People v. Murphy, 35 Cal. App. 3d 905, 933, 111 Cal. Rptr. 295, 312 (1974) (whether a jury will be sequestered or permitted to separate with proper admonishment within sound discretion of trial court); People v. Chaim, 22 Cal. App. 3d 493, 497, 99 Cal. Rptr. 472, 475 (1972). (trial court has discretion to separate or sequester jurors without need of cause).

51. *Ruiz*, 44 Cal. 3d at 616, 749 P.2d at 868, 244 Cal. Rptr. at 214.

52. *Id.* at 616-17, 749 P.2d at 868, 244 Cal. Rptr. at 214. The court, however, acknowledged that in other states, sequestration in capital cases was mandatory. *See, e.g.*, People v. Jones, 711 P.2d 1270, 1279 (Colo. 1986) (where a state statute requires sequestration in capital cases); Lowery v. State, 434 N.E.2d 868, 869-70 (Ind. 1982) (where the court interpreted a state statute to require sequestration in capital cases).

53. CAL. PENAL CODE § 1121 (West 1985). The jurors sworn to try an action may, *in the discretion of the court*, be permitted to separate or be kept in charge of a proper officer." *Id.* (emphasis added). *Ruiz*, 44 Cal. 3d at 616, 749 P.2d at 868, 244 Cal. Rptr. at 214.

54. *Ruiz*, 44 Cal. 3d at 616, 749 P.2d at 868, 244 Cal. Rptr. at 214.

55. *Id.*

E. Instructions on Mitigating Factors

The defendant contended that the jury was inadequately instructed as to the propriety of certain mitigating factors that could be considered in determining the defendant's sentence. In particular, the defendant argued that the court's modification of former section 190.3 subdivision (j) of the Penal Code[56] was inadequate to cure the patent flaws in the section. The trial judge instructed the jury that they were not limited to the statutory list of aggravating or mitigating factors contained in section 190.3. Furthermore, the trial judge instructed the jury that they may consider any circumstance which mitigates the gravity of the crime. Nevertheless, the defendant still argued that the court inadequately instructed the jury as to the broad scope of its sentencing discretion.

The court first noted that, in determining whether the jury was adequately informed of its responsibility to consider all mitigating factors presented during the case, it must review the record in its entirety.[57] The court concluded that the trial judge's instructions, the prosecutor's statements, and the defense counsel's statement sufficiently explained and clarified for the jury that they could consider all relevant mitigating factors, including the defendant's background and character in determining the appropriate penalty.[58] The court concluded that the jury was adequately instructed.[59]

In a related argument, the defendant contended that the trial court was required to affirmatively instruct the jury that sympathy was a proper consideration in determining the defendant's sentence. The defendant argued that because the jury was instructed not to consider sympathy or passion in determining guilt during this phase, there was potential for confusion and the jury could have believed that sympathy was an improper consideration in the penalty phase. Case precedence holds that a trial court's failure to instruct a jury not to consider sympathy at the penalty phase may be grounds for reversal.[60] The court found that the record clearly indicated no im-

56. CAL. PENAL CODE § 190.3(k) (West 1988) (formerly CAL. PENAL CODE § 190(j)).

57. *Ruiz*, 44 Cal. 3d at 623, 749 P.2d at 872, 244 Cal. Rptr. at 218; *see* California v. Brown, 107 S. Ct. 837, 842 (1987) (O'Connor, J., concurring); People v. Ghent, 43 Cal. 3d 739, 777-78, 739 P.2d 1250, 1275-76, 239 Cal. Rptr. 82, 107-08 (1987).

58. *Ruiz*, 44 Cal. 3d at 623-24, 749 P.2d at 873, 244 Cal. Rptr. at 218-19.

59. *Id.* at 624, 749 P.2d at 873, 244 Cal. Rptr. at 219.

60. *See, e.g.*, People v. Easley, 34 Cal. 3d 858, 875-80, 671 P.2d 813, 823-27, 196 Cal. Rptr. 309, 319-23 (1983) (court held that the trial judge erred in instructing the jury that it could not be influenced by sympathy in determining the appropriate penalty).

proper carryover of the guilt phase instruction in question.[61]

The court relied on two recent cases, *People v. Rodriguez*[62] and *People v. Miranda*,[63] which held that an antisympathy instruction given during the guilt phase did not mislead the jury into applying the same instruction during the penalty phase.[64] The *Ruiz* court carefully reviewed the record and determined that there was testimony by the defendant's friends and relatives, as well as arguments made by the defense counsel to the jury, which were of a sympathetic nature.[65] The court concluded that the trial court's failure to affirmatively instruct the jury that sympathy was a proper consideration during the penalty phase was not erroneous.[66]

IV. JUSTICE BROUSSARD'S CONCURRING AND DISSENTING OPINION

Justice Broussard concurred with the majority as to its affirmation of the first degree murder conviction of the defendant for the murders of Pauline Ruiz and Tony Mitchell.[67] However, Justice Broussard vigorously disagreed with the majority's holding that the defendant's motion to sever the Tanya Ruiz murder count was properly denied.[68] He believed that if the evidence pertaining to the murders of Pauline Ruiz and Tony Mitchell were properly excluded, then the evidence would be insufficient to sustain the conviction against the defendant for the murder of Tanya Ruiz.[69] Justice Broussard concluded that the cumulative effect of the foregoing errors was substantial. Therefore, the death penalty sentence imposed, by the jury, should be reversed.[70]

Justice Broussard's principal argument was that the majority ignored both statutory and case law in holding that the evidence presented, pertaining to the murders of Pauline Ruiz and Tony Mitchell, was cross admissible.[71] Section 1101(a) of the Evidence

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61. *Ruiz*, 44 Cal. 3d at 624-25, 749 P.2d at 873, 244 Cal. Rptr. at 219.

62. 42 Cal. 3d 730, 785, 726 P.2d 113, 148-49, 230 Cal. Rptr. 667, 702-03 (1986). "[T]he potential for confusion [from a no-sympathy instruction during the guilt phase], while it exists theoretically, is more attenuated." *Id.*

63. 44 Cal. 3d 57, 102, 744 P.2d 1127, 1155, 241 Cal. Rptr. 594, 622 (1987) (the jury was not misled into applying antisympathy guilt phase instruction at the penalty phase).

64. *Ruiz*, 44 Cal. 3d at 624, 749 P.2d at 873, 244 Cal. Rptr. at 219.

65. *Id.* at 625, 749 P.2d at 873, 244 Cal. Rptr. at 219.

66. *Id.*

67. *Id.* at 625-26, 749 P.2d at 874, 244 Cal. Rptr. at 220 (Broussard, J., concurring and dissenting).

68. *Id.* at 626, 749 P.2d at 874, 244 Cal. Rptr. at 220 (Broussard, J., concurring and dissenting).

69. *Id.* (Broussard, J., concurring and dissenting).

70. *Id.* at 634, 749 P.2d at 879, 244 Cal. Rptr. at 225 (Broussard, J., concurring and dissenting).

71. *Id.* at 626, 749 P.2d at 874, 244 Cal. Rptr. at 220 (Broussard, J., concurring and dissenting).

Code[72] provides that "evidence of a person's character . . . is inadmissible when offered to prove his conduct on a specific occasion."[73] Furthermore, case precedence precludes the "admissibility of evidence of other crimes . . . [if] it is offered to prove criminal disposition or propensity on the part of the accused to commit the crime charged."[74] Justice Broussard determined that although evidence of other crimes might be relevant, it is highly prejudicial at the time, therefore a court should exercise extreme caution in determining whether such evidentiary concerns should be resolved in favor of the defendant.[75]

Justice Broussard expressly disagreed with the majority's finding that sufficient similarities existed between the Tanya Ruiz murder charge and the other two murder charges to permit cross admissibility at separate trials[76] He contended that under the standards set forth in *People v. Rivera*,[77] *People v. Haston*,[78] and *People v. Alcala*,[79] the similarity requirement pertaining to cross admissibility of evidence was not established.[80] Justice Broussard concluded that the prosecution failed to produce sufficient evidence of shared characteristics or common marks necessary to raise the requisite inference that the two sets of murders were committed by the same perpetra-

72. CAL. EVID. CODE § 1101(a) (West 1966).

73. *Id.*

74. *Ruiz*, 44 Cal. 3d at 626, 749 P.2d at 674, 244 Cal. Rptr. at 220 (Broussard, J., concurring and dissenting) (citing People v. Haston, 69 Cal. 2d 233, 244, 444 P.2d 91, 98, 70 Cal. Rptr. 419, 426 (1968)).

75. *Ruiz*, 44 Cal. 3d at 626-27, 749 P.2d at 875, 244 Cal. Rptr. at 220-21 (Broussard, J., concurring and dissenting).

76. *Id.* at 627-28, 749 P.2d at 875, 244 Cal. Rptr. at 221 (Broussard, J., concurring and dissenting).

77. 41 Cal. 3d 388, 392, 710 P.2d 362, 364-65, 221 Cal. Rptr. 562, 564, (1985). "[I]n order for evidence of a prior crime to have a tendency to prove the defendant's identity as the perpetrator of the charged offense, the two acts must have *enough shared characteristics* to raise a strong inference that they were committed by the same person." *Id.* (emphasis added).

78. 69 Cal. 2d 233, 444 P.2d 91, 70 Cal. Rptr. 419 (1968). In *Haston*, the court held that "the general test of admissibility of evidence in a criminal case is whether it tends logically, naturally, and by reasonable inference, to establish any fact material for the People or to overcome any material matter sought to be proved by the defense." *Id.* at 244, 444 P.2d at 98, 244 Cal. Rptr. at 426.

79. 36 Cal. 3d 604, 632, 685 P.2d 1126, 1141, 205 Cal. Rptr. 775, 790, (1984) "[W]here the prosecution seeks to fix responsibility for a particular crime on defendant by showing a consistent modus operandi, there must be common marks which, considered singly or in combination, support the strong inference that the current crime bears his signature." *Id.*

80. *Ruiz*, 44 Cal. 3d at 627-28, 749 P.2d at 875-76, 244 Cal. Rptr. at 221-22 (Broussard, J., concurring and dissenting).

tor.[81] Furthermore, he believed that the majority's contention that the evidence was cross admissible to establish that Tanya died from a criminal agent was fallacious.[82] He argued that in this instance the term "criminal agency" was merely a euphemism for "criminal disposition" and such evidence would be excluded under section 1101(a) of the Evidence Code.[83]

Justice Broussard next contended that under the standard set forth in *Williams v. Superior Court*,[84] the trial court abused its discretion in denying the defendant's motion for severance.[85] He based this contention primarily on the fact that the evidence should not have been found cross admissible, the case against the defendant for the murder of Tanya Ruiz was weak, and the evidence pertaining to the other two murders altered the outcome of the first murder charge.[86] Justice Broussard believed that the evidence exclusively pertaining to the Tanya Ruiz murder was insufficient to affirm the conviction.[87] He concluded that there was a reasonable possibility that the aforementioned errors made by the trial court were substantial. Therefore, the death penalty sentence, imposed by the jury, should be reversed.[88]

V. CONCLUSION

People v. Ruiz will have a significant effect on California. Since the court held that the trial judge did not abuse its discretion in denying the defendant's severance motion, it properly reaffirmed previous decisions which held that a trial court has very broad discretion in determining whether a severance motion should be denied. The court also held that cross-admissibility of evidence is the most salient inquiry in determining whether severance should be denied. Although the court did not hold that cross-admissibility is a "bright-line" test per se, it did find that, if the evidence had been cross-admissible, the requisite prejudice necessary to establish abuse of discretion could not be inferred. Finally, the court properly held that

81. *Id.* (Broussard, J., concurring and dissenting).

82. *Id.* at 629, 749 P.2d at 876, 244 Cal. Rptr. at 222 (Broussard, J., concurring and dissenting).

83. *Id.* at 629-30, 749 P.2d at 876-77, 244 Cal. Rptr. at 222. *See supra* notes 71-75 and accompanying text.

84. 36 Cal. 3d 441, 447, 683 P.2d 699, 706, 204 Cal. Rptr. 700, 707 (1984) (where the trial court abused its discretion in denying a severance motion).

85. *Ruiz*, 44 Cal. 3d at 630-31, 749 P.2d at 877, 244 Cal. Rptr. at 223 (Broussard, J., concurring and dissenting).

86. *Id.* at 630-31, 749 P.2d at 877, 244 Cal. Rptr. at 223 (Broussard, J., concurring and dissenting).

87. *Id.* at 633, 749 P.2d at 879, 244 Cal. Rptr. at 224 (Broussard, J., concurring and dissenting).

88. *Id.* at 634, 749 P.2d at 879, 244 Cal. Rptr. at 225 (Broussard, J., concurring and dissenting).

the two sets of murders were sufficiently similar to satisfy the cross-admissibility requirement. The court's decisions in this case were rational and illustrate its solid commitment to affirming death penalty sentences where the trial court used its sound discretion.

RONALD P. SCHRAMM

E. *A "claim-of-right" defense is unavailable when the claim involves an illegal activity; intent to kill before finding special circumstances is not required when the defendant is alleged to be the actual killer:* **People v. Hendricks.**

I. INTRODUCTION

In *People v. Hendricks*,[1] the California Supreme Court upheld the imposition of the death penalty after the jury found all alleged special circumstances to be true.[2] The court dismissed all alleged errors as harmless,[3] and reaffirmed the requirement that contemporaneous objection must occur before an alleged error can be asserted on appeal.[4] Additionally, the court reaffirmed the wide latitude that trial courts have in determining the admissibility of evidence pursuant to section 352 of the Evidence Code.[5]

In the guilt phase, the court held harmless the admission into evidence of the victim's checkbooks which the defendant previously admitted taking.[6] Furthermore, the court indicated that the evidence of past uncharged homicides may be used to impeach a psychologist ex-

1. 44 Cal. 3d 635, 749 P.2d 836, 244 Cal. Rptr. 181 (1988), *reh'g denied, modified*, 44 Cal. 3d 1254a, 749 P.2d 836, 244 Cal. Rptr. 181 (1988). Chief Justice Lucas wrote the majority opinion, in which Justices Panelli, Arguelles, Kaufman, and Eagleson concurred. Justice Mosk concurred in the affirmation of the defendant's guilt, but dissented as to the affirmation of the death penalty. Justice Broussard concurred with Justice Mosk.

2. For a general overview of death penalty procedure, see generally Kopeny, *Capital Punishment—Who Should Choose?*, 12 W. ST. U.L. REV. 383 (1985); 47 C.J.S. *Homicide* §§ 433-435 (1944 & Supp. 1988); 22 CAL. JUR. 3D *Criminal Law* §§ 3340-3347 (1985 & Supp. 1988).

3. For a general overview of reversible error see B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, §§ 435-442 (1963 & Supp. 1985).

4. *Hendricks*, 44 Cal. 3d at 648, 749 P.2d at 842-43, 244 Cal. Rptr. at 188. *See, e.g.*, People v. Easley, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983) (contemporaneous objection at trial necessary for appellate review). *Contra* People v. Frank, 38 Cal. 3d 711, 729 n.3, 700 P.2d 415, 424 n.3, 214 Cal. Rptr. 801, 810 n.3 (1985) (plurality opinion).

5. *Hendricks*, 44 Cal. 3d at 643-44, 749 P.2d at 840, 244 Cal. Rptr. at 185; CAL. EVID. CODE § 352 (West 1966).

6. *Hendricks*, 44 Cal. 3d at 642, 749 P.2d at 838, 244 Cal. Rptr. at 184.

pert witness when a mental defense is raised.[7] Additionally, the court upheld the trial court's rejection of various proposed jury instructions. The court also indicated that a mistrial is not appropriate when error results from the defendant's own voluntary acts.[8] Finally, the court held that intent to kill is not a necessary instruction before a finding of special circumstance when the defendant is the alleged killer.[9]

The court, in the penalty phase, reaffirmed the constitutionality of excusing veniremen for cause for stating that they would automatically vote against the imposition of the death penalty.[10] Photographs of victims are admissible when relevant and not unduly shocking or gruesome.[11] Evidence of other crimes need not be proved beyond a reasonable doubt before admission.[12] Objections to alleged errors must be contemporaneous with the alleged error in order to properly raise the alleged error on appeal.[13] Allegations of the defendant's future dangerousness, when briefly raised in closing argument, are harmless.[14] Finally, section 190.3 of the Penal Code[15] is constitutional and the prosecutor complied with its requirements by stating that the final determination of the penalty was in the jury's hands.[16]

II. FACTUAL SUMMARY

The defendant was a homosexual prostitute. After having sexual encounters with his customers, he would return to the customers' residences to kill and rob them. The defendant was charged with the murders of James Parmer and Charleston Haynes. After a sexual encounter with Parmer, the defendant returned to Parmer's residence, shot him at point-blank range six times, and then took numerous items from Parmer's apartment, including his checkbook. The last three shots occurred when Parmer was unconscious on the floor. Similarly, after a sexual encounter with Haynes, the defendant went to Haynes' hotel room and shot him five times. The last three shots occurred while Haynes was lying on the bed. The defendant then took some of Haynes' belongings, including a checkbook.

During the guilt phase, the jury found the defendant guilty of all but one count and found all but one special circumstance to be true.

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7. *Id.*
8. *Id.* at 642-43, 749 P.2d at 838, 244 Cal. Rptr. at 184-85.
9. *Id.* at 644, 749 P.2d at 840-41, 244 Cal. Rptr. at 185-86.
10. *Id.* at 644-45, 749 P.2d at 840-41, 244 Cal. Rptr. at 186.
11. *Id.* at 645-46, 749 P.2d at 841, 244 Cal. Rptr. at 186-87.
12. *Id.* at 648, 749 P.2d at 842, 244 Cal. Rptr. at 188.
13. *Id.* at 649, 749 P.2d at 842-43, 244 Cal. Rptr. at 188.
14. *Id.* at 649, 749 P.2d at 843, 244 Cal. Rptr. at 189.
15. *Id.* at 650, 749 P.2d at 843, 244 Cal. Rptr. at 189; CAL. PENAL CODE § 190.3 (West 1988).
16. *Hendricks*, 44 Cal. 3d at 652-53, 749 P.2d at 845-46, 244 Cal. Rptr. at 190-91.

In the penalty phase, the defendant offered the testimony of a psychologist in order to establish the defense of "homosexual rage."[17] The prosecution then introduced evidence of three previous murders allegedly committed by the defendant. A prosecution psychiatrist testified that based on the previously alleged murders, the defendant could form the intent to steal and kill, premeditate, deliberate, and harbor malice. The jury returned a penalty of death and appeal was automatically perfected under section 1239(b) of the Penal Code.[18]

III. GUILT PHASE

A. Admission of Checkbooks

As to the first allegation of error, the failure to exclude the victims' checkbooks as fruits from an illegal arrest was harmless in light of the defendant's subsequent confession to taking the checkbooks.[19]

B. Impeachment with Past Uncharged Homicides

Where a defense psychologist testifies on the defendant's state of mind during the killings, such testimony is a mental defense. Therefore, introduction of evidence by the prosecutor of past uncharged homicides, to impeach the expert, is admissible. Furthermore, expert witnesses can be extensively cross examined; thus, what is allowable for impeachment purposes is within the trial court's discretion.[20] When testimony is probative and not unduly prejudicial, it may be used by the prosecutor to impeach.

C. Proposed Jury Instructions

The court upheld the trial court's denial of the defendant's three proposed jury instructions. The defendant proposed an instruction which would acknowledge a "claim-of-right" defense. This defense negates intent where a person taking property has a good faith belief that he owned the property.[21] However, there is no claim-of-right defense where the right claimed is based on an illegal activity such as

17. Homosexual rage is the irresistible impulse to kill which arises out of the fear that one is a homosexual. 44 Cal. 3d at 641, 749 P.2d at 838, 244 Cal. Rptr. at 183.

18. CAL. PENAL CODE § 1239(b) (West Supp. 1988).

19. 44 Cal. 3d at 641-43, 749 P.2d at 838, 244 Cal. Rptr. at 184.

20. *Id.* at 642, 749 P.2d at 838, 244 Cal. Rptr. at 184.

21. For this proposition the defendant relied on People v. Butler, 65 Cal. 2d 569, 421 P.2d 703, 55 Cal. Rptr. 511 (1967). The proposition of defense counsel was for modification of California Jury Instructions, Criminal (CALJIC) No. 9.10 (4th ed. 1979) [hereinafter CALJIC], the general instruction regarding the definition of robbery.

prostitution.[22]

The defendant next proposed an additional instruction regarding the intent to steal. However, the trial court refused the instruction based on the conclusion that the instruction would confuse the jury.[23] The court upheld the refusal, as the proposed instruction merely restated other instructions already given on intent to steal.[24]

The third and final proposed instruction involved involuntary manslaughter. The court indicated that there is no duty to give an instruction when there is no "substantial evidence in support" of the instruction.[25] The trial court's refusal to give the proposed instruction was upheld based on the evidence that the defendant shot his victims at point-blank range when one was unconscious and the other lying prone on a bed. The defendant's evidence in opposition, his tape-recorded statements denying intent, were insubstantial in character.[26]

D. Mistrial Allegation and Improper Photographs

The defendant moved for a mistrial after he confessed in court to committing six murders. The court stated that the defendant's voluntary acts did not provide grounds for a mistrial.[27] Additionally, the defendant alleged that the trial court abused its discretion in admitting photographs of the two victims. Relying on section 352 of the Evidence Code,[28] the court indicated that the photographs were relevant to the issue of malice and were not shocking. Thus, there was no abuse of discretion.[29]

E. Intent to Kill Instructions

The defendant alleged that intent to kill instructions must be given to the jury prior to the special circumstance findings of felony-mur-

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22. *Hendricks*, 44 Cal. 3d at 642, 749 P.2d at 838, 244 Cal. Rptr. at 184.

23. The proposed instruction stated: "If you have a reasonable doubt whether the defendant formed an intent to steal from Mr. Parmer and/or Mr. Haynes before they were shot, then you are instructed that Mr. Parmer and/or Mr. Haynes were not killed in the perpetration of, or attempt to perpetrate, the crime of robbery." 44 Cal. 3d at 642-43, 749 P.2d at 839, 244 Cal. Rptr. at 185. The defendant felt that although there might have been a "cosmetic" problem, the proposed instruction was proper as framed. *Id.* at 643, 749 P.2d at 839, 244 Cal. Rptr. at 185.

24. The court gave CALJIC Nos. 8.21 and 9.10 on intent to steal.

25. 44 Cal. 3d at 643, 749 P.2d at 839, 244 Cal. Rptr. at 185. For this proposition the court cited People v. Flannel, 25 Cal. 3d 668, 603 P.2d 1, 160 Cal. Rptr. 84 (1979).

26. *Hendricks*, 44 Cal. 3d at 643, 749 P.2d at 839, 244 Cal. Rptr. at 185. The court indicated that such statements were self-serving and thus implied that their veracity was suspect. *Id.*

27. *Id.* at 643, 749 P.2d at 839, 244 Cal. Rptr. at 185.

28. Section 352 gives the trial court broad discretion in determining whether the probative value of proffered evidence outweighs its prejudicial value. CAL. EVID. CODE § 352 (West 1966).

29. *Id.* at 644, 749 P.2d at 840, 244 Cal. Rptr. at 185.

der robbery, felony-murder burglary, or multiple murder. However, the court held that no such instruction need be given.[30] Under the auspices of *People v. Anderson*,[31] an intent to kill instruction is necessary only when the defendant could be found to be an accomplice, rather than the actual murderer. An intent to kill instruction is not required where the defendant is the alleged actual killer.

IV. PENALTY PHASE

A. Excuse of Veniremen for Cause

The defendant alleged error in excusing veniremen for cause who would automatically vote against the death penalty. The court stated that under the United States Supreme Court opinion of *Wainwright v. Witt*,[32] it is proper to exclude veniremen for cause when they indicate that they would automatically vote not to impose the death penalty.[33]

B. Evidence of Other Crimes and Admissibility of Photographs

Regarding the prosecutor's offer of evidence of other crimes, the court indicated that there was no denial of due process.[34] However, the defendant contended that the admission of certain photographs depicting the condition of various victims' bodies violated section 352 of the Evidence Code by being too prejudicial, too gruesome, and cumulative. The court indicated, and the defendant conceded, that the photographs were relevant to the determination of the penalty. The court concluded that the photographs were not so shocking or gruesome as to be unduly prejudicial under section 352. Alternatively, the court reasoned that even if the trial court erred in admitting the photographs, the error was not prejudicial since the penalty phase

30. *Id.* at 644, 749 P.2d at 840, 244 Cal. Rptr. at 186.

31. 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987).

32. 469 U.S. 412 (1985). The standard set forth in *Wainright* allowed excuse for cause where a veniremen's beliefs would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). For a general overview of the jury selection process in California, see B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, §§ 393-423 (1963 & Supp. 1985).

33. *Hendricks*, 44 Cal. 3d at 645, 749 P.2d at 841, 244 Cal. Rptr. at 186.

34. Evidence was offered by the prosecution, in the penalty phase, that the defendant had murdered Harry Carter, James Butchers, and Virginia Hernandez prior to the murders charged in the present case. 44 Cal. 3d at 640, 749 P.2d at 838, 244 Cal. Rptr. at 183.

outcome would still have been the same.[35]

C. *Confessions of the Defendant During the Penalty Phase*

During the penalty phase, the defendant confessed to killing an individual while robbing a small market in San Francisco. The prosecutor asked the state's psychiatrist if the San Francisco killing was probative as to whether the defendant could plan, use a gun, and commit a crime. The psychiatrist stated that the prior killing did show the defendant's capability of planning a crime, committing it, and using a gun in the process. The defendant alleged that the psychiatrist's testimony was based on an improper foundation since evidence of other crimes must be proved beyond a reasonable doubt before being admitted into evidence. The court rejected this argument and added that defense counsel did not contemporaneously object to the defendant's confession,[36] thereby waiving the right to contest the admissibility on appeal.

D. *Future Dangerousness*

The defendant further alleged that the prosecutor violated *People v. Murtishaw* by commenting in closing argument on the defendant's future dangerousness.[37] The court, in distinguishing *Murtishaw*, indicated that the prosecutor's comment did not constitute an expert prediction; rather, such comment was merely argument. The court refused to equate the prosecutor's brief comment with the *Murtishaw* comments which comprised a major part of that prosecution's penalty phase presentation.[38] Furthermore, defense counsel failed to contemporaneously object which would have cured the error. Thus, the defendant was deemed to have waived the error on appeal.[39]

E. *Section 190.3 of the Penal Code*

The defendant's penultimate argument raises the constitutionality of the sentencing formula under section 190.3 of the Penal Code.[40] The defendant argued that the jury did not have the constitutionally required sentencing discretion when applying section 190.3.[41] The

35. CAL. EVID. CODE § 352 (West 1966).

36. 44 Cal. 3d at 646, 749 P.2d at 841, 244 Cal. Rptr. at 187; CAL. EVID. CODE § 352 (West 1966).

37. 44 Cal. 3d at 648, 749 P.2d at 842-43, 244 Cal. Rptr. at 188; *see supra* note 4; B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, § 293h (Supp. 1985).

38. *Hendricks*, 44 Cal. 3d at 649, 749 P.2d at 843, 244 Cal. Rptr. at 189 (citing People v. Murtishaw, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981)) (expert predictions as to future dangerousness of the defendant generally inadmissible at trial).

39. *Id.* at 650, 749 P.2d at 843, 244 Cal. Rptr. at 189.

40. *Id.* at 649-50, 749 P.2d at 843, 244 Cal. Rptr. at 189.

41. CAL. PENAL CODE § 190.3 (West 1988). The constitutionality of section 190.2

court rejected the claim of unconstitutionality and indicated that the application of section 190.3 would be determined on a case by case basis.

Additionally, the defendant contended that the prosecutor's comments misled the jury into a rote weighing of the mitigating and aggravating factors without placing personal values on the factors as required by *People v. Allen*.[42] The court agreed that a mechanical weighing of the factors is unsatisfactory and that jurors must know that they can assign their own weight to the factors to decide whether "death is the appropriate penalty under all the circumstances."[43] However, the court found that both the prosecution and defense counsel informed the jury in this case as to its discretion in determining the appropriate penalty. For example, the prosecution remarked that the jury must "follow the law" and otherwise indicated that the jury could attach its own weight to the factors.[44] Additionally, defense counsel made similar statements regarding the jurors' ability to personally weigh the factors to determine the appropriate penalty.

F. Ultimate Responsibility for Appropriateness of Death Penalty

Finally, the defendant argued that the prosecutor's closing argument violated *Caldwell v. Mississippi*.[45] The court, however, held that the prosecutor did not violate *Caldwell* as he never told the jury that the sentencing was not ultimately in the hands of the jurors.[46]

V. JUSTICE MOSK CONCURRING AND DISSENTING

Justice Mosk wrote separately and was joined by Justice Broussard. Both concurred in the findings in the guilt phase but dissented

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was upheld in Pulley v. Harris, 465 U.S. 37 (1984) and People v. Rodriguez, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986).

42. 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986), *cert. denied*, 108 S. Ct. 202 (1987).

43. *Hendricks*, 44 Cal. 3d at 651, 749 P.2d at 844, 244 Cal. Rptr. at 190.

44. The prosecutor stated that the law requires "you [to] *weigh* the aggravating and mitigating factors." *Id.* at 652, 749 P.2d at 845, 244 Cal. Rptr. at 191 (emphasis in original).

45. 472 U.S. 320 (1985).

46. The court relied on the prosecutor's opening remarks where he stated that the jury is "going to have *one of the most important decisions that [they] will probably have to make in the course of [their] lifetime* because [they] are going to decide based on the evidence and the law whether a human being shall suffer life imprisonment or shall suffer death." 44 Cal. 3d at 655, 749 P.2d at 847, 244 Cal. Rptr. at 193 (emphasis in original).

on the affirmance of the death penalty. Justice Mosk strongly stated that the majority was willing to find errors harmless so long as they were correct "in some respect."[47] He focused on the application of section 190.3 and found a violation of the mandates of *People v. Brown*[48] and *Caldwell v. Mississippi*.[49] Although indicating that the court's instructions to the jury were misleading, his chief ire was reserved for the prosecutor's closing arguments, which he felt misled the jury as to what the weighing process entailed.

VI. CONCLUSION

Justice Mosk's opinion raises sound objections to the court's analyses of penalty phase errors. The majority opinion is indicative of the court's trend to give tremendous latitude to the findings of the jury. The court seems to attach the same weight to errors alleged in both the guilt and penalty phases. By doing so, the court disregards the fact that penalty phase errors are more adverse in a death penalty case and therefore should be given closer scrutiny, regardless of whether contemporaneous objections are made or not.[50]

ERNEST F. BATENGA

F. *Reversible error does not exist despite contentions that the state's key witness testified under the influence of drugs, that evidence linking the defendant to the victim was hearsay, and that the jury considered one inseparable action as two aggravating circumstances:* **People v. Melton.**

I. INTRODUCTION

In *People v. Melton*,[1] the court upheld the jury's imposition of the death penalty after affirming the finding of first degree murder during the commission of a burglary and robbery.[2] The court addressed twenty-one contentions of error and declared all meritless or harmless.

Several of the court's many guilt phase holdings were especially

47. *Id.* at 656, 749 P.2d at 847-48, 244 Cal. Rptr. at 196 (Mosk, J., concurring and dissenting).

48. 40 Cal. 3d 512, 538-544, 726 P.2d 516, 230 Cal. Rptr. 834 (1985), *rev'd sub nom.* California v. Brown, 107 S. Ct. 837 (1987).

49. 472 U.S. 320 (1985).

50. *See* People v. Frank, 38 Cal. 3d 711, 729 n.3, 700 P.2d 415, 424 n.3, 214 Cal. Rptr. 801, 810 n.3 (1985) (plurality opinion).

1. 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867 (1988). The majority opinion was written by Justice Eagleson, with Chief Justice Lucas and Justices Mosk, Panelli, Arguelles and Kaufman concurring. A separate dissenting and concurring opinion was filed by Justice Broussard.

2. *See* CAL. PENAL CODE §§ 190-190.5 (West 1988).

relevant: first, the court did not find error in the trial court's refusal to order a bodily intrusion of a key witness whom the defendant suspected had testified under the influence of drugs; second, the court affirmed the admission of admittedly gruesome and potentially prejudicial photographs of the victim as well as incriminating evidence which admittedly may have been hearsay; third, the court declared certain testimony irrelevant yet harmless despite its potentially damaging effects; fourth, the court held that a violation of the attorney work product privilege did not occur; and fifth, the court reaffirmed its decision to overrule the instructional guidelines set forth in *Carlos v. Superior Court*.[3]

As to error raised in the penalty phase, the court held: juror misconduct did not occur when jurors innocently and coincidentally watched a television program about the death penalty; the defendant was not denied the right to present mitigating factors of his youth although certain records had been destroyed; graphic evidence of the defendant's past crimes was admissible although the defendant stipulated to the convictions; instructional confusion did not result although the jury may have remembered and applied inapplicable guilt phase admonitions during the penalty phase; the jury was properly instructed as to the method of assigning weights to aggravating and mitigating circumstances; and the jury properly counted a robbery and burglary arising out of a single act as two aggravating circumstances.

II. FACTUAL SUMMARY

The defendant was convicted of murdering a seventy-seven year old homosexual male with a finding of special circumstances.[4] Although the defendant's fingerprints were not found at the murder scene, an entry in the victim's calendar showed that the defendant was to meet the victim to see if the two might be sexually compatible. Boyd, the state's primary witness and ex-lover of the defendant, was granted immunity and testified against the defendant. The defendant admitted to entering the victim's house, finding the victim's corpse and taking the victim's car. The defendant was arrested three days after the victim's body was found. Six-and-a-half years after the murder, this appeal was heard and the death penalty affirmed.

3. 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).
4. CAL. PENAL CODE § 190.1 (West 1988).

III. THE MAJORITY OPINION

A. The Guilt Phase

Among many other contentions of guilt phase error, the defendant asserted: 1) denial of the right to confront witnesses; 2) improper admission of hearsay evidence; 3) use of prejudicial photographs; 4) violation of the attorney work product privilege; and 5) instructional error.

1. Refusal to submit witness to physical examination

The court held that despite the recognized right to confrontation of witnesses,[5] a defendant has no right to force a bodily intrusion upon a witness absent probable cause that the witness' in court testimony is affected by drugs.[6] The defendant asserted that Boyd's sluggish responses, tired eyelids and sunglasses indicated the influence of drugs while on the witness stand.[7] Thus, the defendant stated that the witness should have been drug tested for impeachment purposes.[8] The court held that the trial court's "external examination for signs of drug use," which resulted in a negative finding, sufficiently dispelled any probable cause of drug use by the witness;[9] therefore, a blood or urine test would have been an unreasonable search and seizure.[10]

2. Admission of hearsay

The court held that a notebook and calendar containing entries in the victim's handwriting, although hearsay, were "admissible to show the victim's state of mind," that is, the decedent's intention to meet with the defendant.[11] The court found that any possible error was harmless in light of the additional evidence linking the defendant to the victim.[12]

3. Prejudicial photographs

The court found that the probative value of numerous pictures de-

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5. U.S. CONST. amend. VI.

6. People v. Scott, 21 Cal. 3d 284, 294, 578 P.2d 123, 127-28, 145 Cal. Rptr. 876, 880-81 (1978) (probable cause necessary for bodily intrusions).

7. *Melton*, 44 Cal. 3d at 736, 750 P.2d at 753, 244 Cal. Rptr. at 879.

8. People v. Manson, 61 Cal. App. 3d 102, 137, 132 Cal. Rptr. 265, 283 (1976) (witness may be impeached by a showing of drug influence); *see* 3 B. WITKIN, CALIFORNIA EVIDENCE, § 1914 (1986).

9. *Melton*, 44 Cal. 3d at 738, 750 P.2d at 754, 244 Cal. Rptr. at 880.

10. *Id.* at 738 n.7, 750 P.2d at 754 n.7, 244 Cal. Rptr. at 880 n.7; *see* U.S. CONST. amend. IV; Schmerber v. California, 384 U.S. 757, 769-70 (1966) (all persons protected against "unwarranted" bodily intrusions by the government); 68 AM. JUR. 2D *Searches & Seizures* §§ 29, 105 (1973); 19 CAL. JUR. 3D *Criminal Law* §§ 2227-2230 (1984).

11. *Melton*, 44 Cal. 3d at 739-40, 750 P.2d at 755, 244 Cal. Rptr. 8 at 881; *see* CAL. EVID. CODE § 1250 (West 1966); 1 B. WITKIN, CALIFORNIA EVIDENCE, § 755 (1986).

12. *Melton*, 44 Cal. 3d at 740, 750 P.2d at 755, 244 Cal. Rptr. at 881.

picting the victim after death was not outweighed by their prejudicial effect.[13] The pictures were clearly "relevant insofar as they suggested a willful and deliberate killing."[14] The court further rejected the defendant's contention that the trial court failed to make an adequate record of its deliberations on this issue.[15] Additionally, the court found that the trial court did not abuse its discretion.[16]

4. Testimony elicited from defense investigator

During the prosecution's cross examination, a defense investigator testified that Boyd told the investigator that the defendant was not responsible for the murder. The investigator stated that he did not inform the police about this statement, implying that the investigator did not believe Boyd's story. The court denied the claim that the cross examination of the defendant's investigator violated the attorney work product privilege.[17] The defendant was deemed to have waived any work product privilege by allowing his own investigator to testify.[18]

However, the court agreed that the investigator's lay testimony of Boyd's credibility was "irrelevant and incompetent."[19] The evidence did not establish that the investigator was an expert witness nor an individual familiar with Boyd's "reputation for veracity."[20] Nevertheless, the technically inadmissible testimony was deemed "minimal in context" and thus harmless.[21]

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13. *Id.* at 741, 750 P.2d at 756, 244 Cal. Rptr. at 882; *see* CAL. EVID. CODE § 352 (West 1966).

14. *Melton*, 44 Cal. 3d at 741, 750 P.2d at 756, 244 Cal. Rptr. at 882.

15. *Id.* at 740, 250 P.2d at 755, 244 Cal. Rptr. at 882; *see* People v. Green, 27 Cal. 3d 1, 24-27, 609 P.2d 468, 481-83, 164 Cal. Rptr. 1, 14-16 (1980) (discussing the need for adequate records of judicial deliberations).

16. *Melton*, 44 Cal. 3d at 741, 750 P.2d at 756, 244 Cal. Rptr. at 882; *see* People v. Frierson, 25 Cal. 3d 142, 171, 599 P.2d 587, 604, 158 Cal. Rptr. 281, 297-98 (1979) (admission of photographs primarily at discretion of the trial court).

17. *Melton*, 44 Cal. 3d at 743, 750 P.2d at 757, 244 Cal. Rptr. at 883. *See generally* 31 CAL. JUR. 3D *Evidence* § 442 (1976).

18. *Melton*, 44 Cal. 3d at 743, 750 P.2d at 757, 244 Cal. Rptr. at 883. *See generally* 31 CAL. JUR. 3D *Evidence* § 442 (1976).

19. *Melton*, 44 Cal. 3d at 743-44, 750 P.2d at 757, 244 Cal. Rptr. at 884; *see* CAL. EVID. CODE § 800 (West 1966); 31 AM. JUR. 2D *Expert & Opinion Evidence* §§ 14, 15 (1967 & Supp. 1988); 1 B. WITKIN, CALIFORNIA EVIDENCE, §§ 447-449 (1986).

20. *Melton*, 44 Cal. 3d at 744, 750 P.2d at 758, 244 Cal. Rptr. at 884; *see* CAL. EVID. CODE § 786 (West 1966); 1 B. WITKIN, CALIFORNIA EVIDENCE, §§ 484-488 (1986).

21. *Melton*, 44 Cal. 3d at 744-45, 750 P.2d at 758, 244 Cal. Rptr. at 884; *see* Chapman v. California, 386 U.S. 18, 24 (1966).

5. Instructional error

The defendant asserted that the trial court erred by not instructing the jury, in accordance with *Carlos v. Superior Court*,[22] that a felony-murder special circumstance requires an intent to kill.[23] The court noted that since *Carlos* had been overruled,[24] a jury need only find that the defendant "personally killed [the victim] in the course of a robbery and burglary."[25] "Intent to kill need be charged and proved for a felony-murder special circumstance only when the defendant was an aider and abettor to the homicide."[26] Because the defendant was the sole perpetrator, the instruction was correct.[27]

B. Penalty Phase

The defendant asserted, *inter alia*: 1) denial of the right to conduct voir dire of jurors on a question material to the case; 2) violation of the constitutional right to preserve favorable evidence; 3) improper admission of graphic testimony of the defendant's past crimes; 4) application of guilt phase instructions by the jury during the penalty phase; 5) inadequate jury instructions as to the weighing of aggravating and mitigating circumstances; and 6) improper counting of aggravating circumstances.

1. Denial of voir dire

The court rejected the assertion that the defense counsel should have had the opportunity to question the jury about a television show called "The Executioner's Song" during voir dire.[28] Despite the defendant's concern that the show glamorized an execution and minimized the gravity of the death penalty, the court found no evidence of any jury misconduct.[29] There is no misconduct in merely watching "a popular television program that happens to discuss the subject matter of the trial in a general way."[30]

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22. 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

23. *Melton*, 44 Cal. 3d at 746-47, 750 P.2d at 760, 244 Cal. Rptr. at 886.

24. *Id.* at 747, 750 P.2d at 760, 244 Cal. Rptr. at 886; *see* People v. Anderson, 43 Cal. 3d 1104, 1138-48, 742 P.2d 1306, 1325-31, 240 Cal. Rptr. 585, 604-11 (1987) (overruling *Carlos*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79).

25. *Melton*, 44 Cal. Rptr. at 747, 750 P.2d at 760, 244 Cal. Rptr. at 886; *see* Tison v. Arizona, 481 U.S. 137 (1987), *cert. granted*, 107 S. Ct. 3201 (1987).

26. *Melton*, 44 Cal. Rptr. at 747, 750 P.2d at 760, 244 Cal. Rptr. at 886.

27. *Id.*

28. *Id.* at 749, 750 P.2d at 761-62, 244 Cal. Rptr. at 888.

29. *Id.* at 749, 750 P.2d at 761, 244 Cal. Rptr. at 887. *See generally* 47 AM. JUR. 2D *Jury* §§ 195-212 (1969).

30. *Melton*, 44 Cal. 3d at 749, 750 P.2d at 761, 244 Cal. Rptr. at 887 (quoting Elsworth v. Beech Aircraft Corp., 37 Cal. 3d 540, 557, 691 P.2d 630, 640-41, 208 Cal. Rptr. 874, 885 (1984)); Comment, *Due Process for Whom—Newspaper or Defendant?*, 4 STAN. L. REV. 101 (1951) (newspaper coverage causing unfair trials).

2. Lost records

The court refused to dismiss the death penalty although records which may have shown mitigating circumstances of the defendant's youth were destroyed by the California Youth Authority (CYA).[31] "The constitutional duty to preserve favorable evidence . . . is not violated when the authorities have no reasonable bases to believe that the material destroyed will have bearing on a criminal defense."[32] Since the records were destroyed long before the offense, there was no error.[33] Additionally, CYA was statutorily authorized to destroy such records.[34] Furthermore, the court noted the availability of other evidence which sufficiently portrayed the life of a CYA ward.[35]

3. Details of past violent crimes

The court found it proper to admit evidence of the defendant's past violent crimes despite the defendant's offer to stipulate to the convictions.[36] "There is no unfairness in allowing the People to show the circumstances of the violent 'criminal activity.' "[37] Similarly, the court allowed evidence of prior convictions which resulted from "bargained pleas."[38] The court held that a "bargained conviction or dismissal is not an 'acquittal' " and thus is admissible at the penalty phase.[39] Finally, the admission of circumstances leading up to prior crimes is proper since they tend to expose a "particularly vicious and callous assault."[40]

4. Carryover effect of guilt phase instruction

Despite a guilt phase instruction to ignore sympathy in arriving at the verdict,[41] the court felt the carryover effect of this instruction as

31. *Melton*, 44 Cal. Rptr. at 750, 750 P.2d at 762, 244 Cal. Rptr. at 888.
32. *Id.; see* California v. Trombetta, 467 U.S. 479, 488-89 (1984).
33. *Melton*, 44 Cal. 3d at 751, 750 P.2d at 763, 244 Cal. Rptr. at 889.
34. *Id.* at 751-52, 750 P.2d at 763, 244 Cal. Rptr. at 889; *see* CAL. WELF. & INST. CODE § 1763 (West 1984).
35. *Melton*, 44 Cal. 3d at 752-53, 750 P.2d at 764, 244 Cal. Rptr. at 890.
36. *Id.* at 754, 750 P.2d at 764-65, 244 Cal. Rptr. at 891.
37. *Id.* at 754, 750 P.2d at 765, 244 Cal. Rptr. at 891; *see* People v. Gates, 43 Cal. 3d 1168, 1203, 743 P.2d 301, 323, 240 Cal.Rptr. 666, 688-89 (1987); CAL. PENAL CODE § 190.3 (West Supp. 1988); Comment, *Capital Punishment—Who Should Choose?*, 12 W. ST. U.L. REV. 383 (1985).
38. *Melton*, 44 Cal. 3d at 755, 750 P.2d at 765, 244 Cal. Rptr. at 891.
39. *Id.* at 755, 750 P.2d at 765, 244 Cal. Rptr. at 891.
40. *Id.* at 757, 750 P.2d at 767, 244 Cal. Rptr. at 899.
41. *Id.* at 758, 750 P.2d at 768, 244 Cal. Rptr. at 894; *see* California Jury Instructions, Criminal (CALJIC), No. 1.00 (4th ed. 1979) [hereinafter CALJIC].

to penalty deliberations was harmless.[42] Although such an instruction at the penalty phase compounded with an instruction to consider all mitigating factors[43] might create ambiguity, the court reasoned that when all instructions were taken as a whole, the jury was substantially informed of its duty to weigh all mitigating factors.[44] Therefore, the guilt phase admonition had no effect on the penalty phase deliberations.[45]

5. Weight of aggravating and mitigating factors

The court held that an instruction requiring the jury to "impose the death penalty if it finds that aggravating circumstances 'outweigh' mitigating ones"[46] did not confuse the jury as to their sentencing responsibilities.[47] Due to the additional admonitions that aggravating factors require proof beyond a reasonable doubt and that one mitigating factor may outweigh all aggravating ones, the jury was clearly advised that it was to decide based on "relative weight, not relative numbers."[48]

6. Indivisible action worth double aggravation

Finally, the court determined that section 190.3(a) of the Penal Code[49] must prevail over section 654 of the Penal Code[50] because section 190.3 operates as a specific statute and an exception to the general rule of section 654. While section 654 prohibits the imposition of more than one sentence for crimes occurring from "indivisible" actions,[51] section 190.3(a) permits all special circumstances to be individually considered as aggravating circumstances.[52] The court rejected any contrary suggestions implied from the plurality opinion

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42. *Melton*, 44 Cal. 3d at 760, 750 P.2d at 769, 244 Cal. Rptr. at 895; *see* People v. Rodriguez, 42 Cal. 3d 730, 785, 726 P.2d 113, 149, 230 Cal. Rptr. 667, 703 (1986).

43. *See* CALJIC No. 8.84.1(k).

44. *Melton*, 44 Cal. 3d at 760, 750 P.2d at 769, 244 Cal. Rptr. at 895; *see* CAL. PENAL CODE § 190.3 (West Supp. 1988); 59 CAL. JUR. 3D *Trial* § 103 (1980).

45. *Melton*, 44 Cal. 3d at 760, 750 P.2d at 769, 244 Cal. Rptr. at 895.

46. *Id.* at 761, 750 P.2d at 769, 244 Cal. Rptr. at 895; *see* CALJIC No. 8.84.2.

47. *Melton*, 44 Cal. 3d at 761, 750 P.2d at 769, 244 Cal. Rptr. at 896; *see* CALJIC No. 8.84.2.

48. *Melton*, 44 Cal. 3d at 761, 750 P.2d at 769, 244 Cal. Rptr. at 896; *see* People v. Brown, 40 Cal. 3d 512, 544, 709 P.2d 440, 458, 220 Cal. Rptr. 637, 655 (1985); 59 CAL. JUR. 3D *Trial* § 103 (1980).

49. CAL. PENAL CODE § 190.3 (West Supp. 1988); *see* Survey, *Review of Selected 1977 California Legislation*, 9 PAC. L.J. 439 (1978).

50. CAL. PENAL CODE § 654 (West 1988); *see, e.g.*, People v. Harris, 36 Cal. 3d 36, 65, 679 P.2d 433, 451, 201 Cal. Rptr. 782, 800 (1984).

51. CAL. PENAL CODE § 654; *see* People v. Beamon, 8 Cal. 3d 625, 637-39, 504 P.2d 905, 913-15, 105 Cal. Rptr. 681, 689-91 (1973); Comment, *Double Jeopardy v. Double Punishment*, 2 SAN DIEGO L. REV. 86 (1965).

52. *Melton*, 44 Cal. 3d at 765, 750 P.2d at 772, 244 Cal. Rptr. at 898.

in *People v. Harris*.[53]

IV. JUSTICE BROUSSARD'S CONCURRING OPINION

Justice Broussard opined that the majority wrongly applied section 190.3.[54] He stated that the majority strayed from precedent by allowing the jury to consider both the robbery and the burglary as separate aggravating factors. According to supreme court policy[55] and the dictates of section 190.3, when two individual crimes arise from the same factual occurrence, both should be considered together as only one aggravating factor.[56] Nevertheless, Justice Broussard approved the defendant's death sentence.

V. CONCLUSION

As Justice Broussard stated, a robbery and a burglary occurring from the same uninterrupted conduct cannot not give rise to two separate punishments under section 654.[57] It thus follows that the two should not be considered as a double aggravating circumstance. As Justice Broussard noted, "the use of such factors 'artificially inflates the particular circumstances of the crime'. . . ."[58]

Because of the particular facts in this sexually deviant murder, counting one indivisible action as two aggravating circumstances probably was harmless. However, the precedent set by this decision will affect more than sexually related murders. The majority rationalizes its decision by stating that the more specific provisions of section 190.3 prevail over section 654.[59] However, it is section 654 which addresses the violation of two statutes by the same conduct, not section 190.3.[60] Thus, it appears that the court's reasoning on this final

53. *Id.* at 766, 750 P.2d at 773, 244 Cal. Rptr. at 899; *see* People v. Harris, 36 Cal. 3d 36, 64-65, 679 P.2d 433, 450-51, 201 Cal. Rptr. 782, 800-01 (1984).

54. *Melton*, 44 Cal. 3d at 773, 750 P.2d at 777-78, 244 Cal. Rptr. at 904 (Broussard, J., concurring).

55. *Id.* at 773, 750 P.2d at 777, 244 Cal. Rptr. at 903-04 (Broussard, J., concurring); *see* People v. Howard, 44 Cal. 3d 375, 410, 749 P.2d 279, 298, 243 Cal. Rptr. 842, 861 (1988); People v. Kimble, 44 Cal. 3d 480, 504-06, 749 P.2d 803, 817-19, 244 Cal. Rptr. 148, 163-64 (1988).

56. *Melton*, 44 Cal. 3d at 774, 750 P.2d at 778, 244 Cal. Rptr. at 904 (Broussard, J., concurring).

57. CAL. PENAL CODE § 654 (West 1988); *see infra* note 60.

58. *Melton*, 44 Cal. 3d at 772, 750 P.2d at 777, 244 Cal. Rptr. at 903 (quoting People v. Harris, 36 Cal. 3d 62, 63, 679 P.2d 433, 449, 201 Cal. Rptr. 782, 798 (1984)).

59. *Melton*, 44 Cal. 3d at 768, 750 P.2d at 774, 244 Cal. Rptr. at 900.

60. Section 654 states:

An act or omission which is made punishable in different ways by different

issue was affected by the facts of this case, resulting in the court rationalizing away a valid contention of error.

MICHELLE R. ANDERSON

G. *The court dismissed contentions that prior criminal conduct was improperly admitted, and that diminished capacity obviated the specific intent to commit first degree murder with special circumstances:* **People v. Williams.**

I. INTRODUCTION

In *People v. Williams*,[1] the California Supreme Court affirmed three counts of the defendant's first degree murder conviction and death penalty sentence with special circumstances.[2] The court held that although the trial court incorrectly instructed the jury as to the legal definition of insanity, the error was harmless.[3] The court also determined that the record was devoid of the evidence necessary to establish inadequate representation by counsel.[4] Finally, the court held that the trial court's refusal to exclude evidence of the defendant's prior criminal acts constituted only harmless error[5] and thus did not warrant reversal of the conviction.[6]

II. FACTUAL AND PROCEDURAL BACKGROUND

In September 1978, the defendant and Robert Tyson stole a .22 Beretta pistol from their employer. The two then robbed a couple in Modesto. Some of the goods stolen from the Modesto couple were then sold at a yard sale at Tyson's home. Two of the defendant's murder victims came to this sale and openly displayed a large amount of currency. On October 8, the defendant and Tyson went to the victims' home. The men from the yard sale were robbed and

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provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other.

CAL. PENAL CODE § 654 (West 1988).

1. 44 Cal. 3d 883, 751 P.2d 395, 245 Cal. Rptr. 336 (1988). Justice Eagleson wrote the majority opinion with Chief Justice Lucas, along with Justices Panelli and Arguelles concurring. Justices Mosk, Broussard, and Kaufman authored separate concurring opinions.

2. *Id.* at 897, 751 P.2d at 403, 245 Cal. Rptr. at 344. The special circumstances were affirmed. However, the court modified the lower court's judgments to reflect that the defendant should have been convicted only of a single multiple-murder special circumstance instead of multiple special circumstances. *Id.*

3. *Id.* at 931-32, 751 P.2d at 427, 245 Cal. Rptr. at 368.

4. *Id.* at 922, 751 P.2d at 420, 245 Cal. Rptr. at 361-62.

5. *Id.* at 914, 751 P.2d at 415, 245 Cal. Rptr. at 356.

6. *Id.*

killed, and a third victim, a female, was taken from the home, raped, and murdered in a field.

Tyson voluntarily surrendered to the police and directed them to the location of the rape victim's body. In November, Williams was arrested in Arizona and subsequently confessed to the crimes. His primary defense at trial was diminished capacity. However, an expert witness testified that despite the defendant's incessant craving of drugs and alcohol, Williams did not lack the capacity to formulate the specific intent necessary to commit the crimes for which he was indicted.[7] The jury found the defendant guilty of three counts of murder.[8] They also found that the offenses were committed pursuant to a robbery which constitutes special circumstances under section 190.2 of the Penal Code[9] and thus affixed a penalty of death.[10]

III. THE MAJORITY OPINION

A. The Refusal to Exclude Prior Criminal Acts and History

The defendant argued that inclusion of prior criminal acts for which he was not formally charged as inherently prejudicial to his defense and in violation of section 1101(b) of the Evidence Code.[11]

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7. The defendant argued that his tremendous appetite for hard drugs and liquor diminished his capacity to form the specific intent required to commit first degree murder. An example of defendant's hunger for drugs and alcohol was described by the court:

> [C]ommencing with the robbery at the Modesto Park . . . he had used morphine and Valium in the morning, smoked marijuana, and consumed diet pills. On Friday, October 6, he had again used heroin, morphine, and Valium. He had also smoked marijuana, and had drunk two to three 6-packs of beer as well as two or three glasses of tequila. In the evening he had LSD. . . . On the way to [the victims' home] he ate four . . . Valium tablets, consumed another eight cans of beer, and at the [victims'] home drank a glass of whiskey. Later that evening, on the way to [the rape site], he drank two cans of beer.

Id. at 902, 751 P.2d at 406-07, 245 Cal. Rptr. at 347-48.

8. *Id.* at 896, 751 P.2d at 403, 245 Cal. Rptr. at 344.

9. CAL. PENAL CODE § 190.2 (West 1988).

10. *Williams*, 44 Cal. 3d at 896, 751 P.2d at 403, 245 Cal. Rptr. at 344.

11. CAL. EVID. CODE § 1101(b) (West Supp. 1988); *Williams*, 44 Cal. 3d at 904, 751 P.2d at 408, 245 Cal. Rptr. at 347. According to the court, three factors must be present in order to admit this highly prejudicial evidence: "(1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence. *Id.* at 905, 751 P.2d at 408-09, 245 Cal. Rptr. at 350. *See* CAL. EVID. CODE §§ 351, 352 (West 1966); *see also* Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003 (1984); Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 PEPPERDINE L. REV. 297 (1982).

Additionally, because the crimes in question occurred prior to June 8, 1982, the "Vic-

Although the court found that such prior acts were erroneously admitted,[12] the error was not prejudicial[13] as other evidence sufficiently established the defendant's guilt.[14]

B. The Admission of Lay-Opinion Testimony

The defendant argued that the opinions of a detective and a correctional officer regarding the defendant's sobriety and lack of drug influence were inadmissible because they were not experts on these issues. In California, lay opinion testimony as to alcohol-induced intoxication and sobriety is admissible where the opinion is "[r]ationally based on the perception of the witness."[15] However, the issue of admissibility of lay opinion in regard to drug intoxication was one of first impression for the court.

The court agreed with several appellate court decisions holding such testimony admissible where a proper foundation is first established.[16] However, the agreement stands only as dictum as the court reasoned that the witnesses never stated an "opinion," but merely testified to their observation that the defendant was not under the influence of narcotics, nor "strung out" on narcotics.[17]

C. The Adequacy of Representation by Counsel

The defendant argued that his trial counsel did not provide constitutionally adequate representation. The court found that the defendant's counsel properly investigated the diminished capacity defense,[18] properly objected to or attempted to suppress an illegally obtained confession,[19] and did not improperly or inadequately attempt to suppress the testimony of Tyson and his wife.[20] Furthermore, the court noted that any claim by the defendant that his trial counsel improperly allowed prior criminal acts to be admitted into evidence was not

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tim's Bill of Rights" section of the California Constitution did not apply. CAL. CONST. art. I, § 28(d) (1983) (inclusion of all relevant evidence in criminal proceedings).

12. *Williams*, 44 Cal. 3d at 909-10, 751 P.2d at 411-12, 245 Cal. Rptr. at 352-53.

13. *Id.* at 909-10, 751 P.2d at 412, 245 Cal. Rptr. at 353.

14. *Id.* at 912, 751 P.2d at 413, 245 Cal. Rptr. at 354-55.

15. *Id.* at 914, 751 P.2d at 415, 245 Cal. Rptr. at 356 (quoting CAL. EVID. CODE § 800(a) (West 1966)). *See* Letwin, *Objections to Non-Expert Opinion Testimony*, 15 UCLA L. REV. 134 (1967).

16. *Williams*, 44 Cal. 3d at 45, 751 P.2d at 415-16, 245 Cal. Rptr. at 345. *See generally* Annotation, *Competency of Non-Expert Witness to Testify in Criminal Case, Based on Personal Observation, as to Whether Person was Under the Influence of Drugs*, 21 A.L.R. 4th 905 (1983).

17. *Williams*, 44 Cal. 3d at 915, 751 P.2d at 416, 245 Cal. Rptr. at 357-58. The witnesses testified that Williams did not exhibit the symptoms of being "strung out"; those symptoms would have included nausea, shaking or trembling, and sweating excessively.

18. *Id.* at 917, 751 P.2d at 417, 245 Cal. Rptr. at 358.

19. *Id.* at 917-18, 751 P.2d at 417-18, 245 Cal. Rptr. at 358-59.

20. *Id.* at 918-19, 751 P.2d at 418-19, 245 Cal. Rptr. at 359-61.

a sign of inadequate representation because the defendant had previously confessed to these crimes.[21] Therefore, the court determined that the record clearly established that the defendant received adequate legal representation as required by the sixth amendment.[22]

D. Special Circumstance Murder Issue

The defendant had been charged with six special circumstances, three of which were based on section 190.2(c)(5)—that a defendant "has in this proceeding been convicted of more than one offense of murder. . . ."[23] The defendant argued that because he had not been convicted of any murder offense at the time of the preliminary pretrial hearing, the charge of six special circumstances was erroneous.[24] The court noted that to uphold allegations of special circumstances, a magistrate is only required to make a pretrial determination that probable cause exists to believe that the defendant "may be" convicted of murder, not that the defendant "has been" convicted.[25] Since the defendant did not make a pretrial motion to set the information aside, any error was deemed waived.[26]

IV. JURY INSTRUCTIONS AS TO THE LEGAL DEFINITION OF INSANITY

The defendant properly contended that the trial court incorrectly stated the *M'Naughten* definition of insanity while instructing the jury during the sanity phase.[27] Case law has established that the standard set forth by the American Law Institute is the correct definition of insanity in California.[28] Although the court acknowledged

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21. *Id.* at 922, 751 P.2d at 420, 245 Cal. Rptr. at 361.

22. *Id.* at 923-34, 751 P.2d at 421, 245 Cal. Rptr. at 362-63; *see* U.S. CONST. amend. VI.

23. CAL. PENAL CODE § 190.2(c)(5) (West 1988).

24. *Williams*, 44 Cal. 3d at 922-23, 751 P.2d at 420-21, 245 Cal. Rptr. at 362-63.

25. *Id.* at 925, 751 P.2d at 422-23, 245 Cal. Rptr. at 364.

26. *Id.*

27. The trial court's instructions stated:

> A person is legally insane if, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. . . . A person whose brain has become diseased or damaged by the use of intoxicating liquor, drugs or narcotics so as to render him incapable of knowing or understanding that his act was wrong, is legally insane.

Id. at 930, 751 P.2d at 426, 245 Cal. Rptr. at 367.

28. *Id.* at 931, 751 P.2d at 426-27, 245 Cal. Rptr. at 368. The proper jury instruction would have been: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the require-

that the trial court erred in stating the *M'Naughten* standard, the error was not prejudicial because the appointed experts and the direct evidence clearly established that Williams was not insane at the time the murders were committed.[29]

V. THE CONCURRING OPINIONS

Justice Mosk agreed with the majority that the multiple murder special circumstance conviction and the death penalty sentence should be affirmed.[30] However, he contended that the trial court's failure to instruct the jury that an independent felonious purpose must be established to convict the defendant of the felony-murder special circumstance constituted prejudicial error.[31] Nevertheless, Justice Mosk concluded that the multiple-murder special circumstance was sufficient to affirm the death penalty verdict against the defendant.[32]

Justice Kaufman filed a concurring opinion in which he stated, "[T]here is no reasonable possibility that absent these errors and defects the jury would have reached determinations more favorable to the defendant."[33] Therefore, Justice Kaufman determined that the majority correctly affirmed the defendant's conviction and death penalty sentence.[34]

VI. CONCLUSION

Automatic review of death penalty cases has overburdened the California Supreme Court.[35] The result is a robotic disposition of all contentions of error. A separate court of appeals may be necessary to eliminate meritless contentions, so that review by the California Supreme Court of such cases would be more clearly focused and obviate the necessity for needlessly expansive review.[36]

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ments of law." *Id.* at 931, 751 P.2d at 427, 245 Cal. Rptr. at 368; *see* People v. Drew, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978). *See generally* 22 CAL. JUR. 3D *Criminal Law* § 63 (1981 & Supp. 1988); Annotation, *Modern Status of Test of Criminal Responsibility—State Cases*, 9 A.L.R. 4th 526 (1981).

29. *Williams*, 44 Cal. 3d at 932-33, 751 P.2d at 427-28, 245 Cal. Rptr. at 369.

30. *Id.* at 973, 751 P.2d at 456, 245 Cal. Rptr. at 397 (Mosk, J., concurring).

31. *Id.* at 973, 751 P.2d at 456, 245 Cal. Rptr. at 397-98 (Mosk, J., concurring).

32. *Id.* at 973-74, 751 P.2d at 456, 245 Cal. Rptr. at 398 (Mosk, J., concurring).

33. *Id.* at 974, 751 P.2d at 456, 245 Cal. Rptr. at 398 (Kaufman, J., concurring).

34. *Id.* (Kaufman, J., concurring).

35. CAL. PENAL CODE § 1239(b) (West 1988).

36. "[I]t is time to eliminate direct appeals to the high court and route capital cases through the appeal courts, where issues can be narrowed and sharpened. . . . [T]he court would be spared some of the *busywork* that consumes its time. . . ." *Unshackle the High Court*, L.A. Times, Oct. 5, 1988, Part II, at 6, col. 1 (emphasis added).

H. *Open candor regarding cruelty of the crime and initial reluctance in being appointed counsel does not constitute ineffective representation. Although the heinous-murder special-circumstance is unconstitutionally vague, a finding of torture-murder special-circumstance alleviates the vagueness error:* **People v. Wade.**

I. INTRODUCTION

In *People v. Wade*,[1] the California Supreme Court upheld the defendant's conviction for first degree murder of his ten-year-old stepchild and affirmed the death penalty sentence.[2] Notwithstanding the numerous arguments raised by the defendant, the court held that the trial court did not err and, even if it did, any error was harmless.

II. SUMMARY OF FACTS

In 1981, the defendant, Melvin Wade, lived with his wife, Irabell Strong, and four of her five children. The children were Penny, Joyce (the victim), Alexis, and Syetta.[3] Although the family relationships were initially friendly, Wade gradually began to mistreat the children.[4]

On the morning of the murder, twenty-four-year-old Wade beat Joyce for neglecting her personal hygiene.[5] He later forced her into an army duffel bag where she remained confined for four hours.[6] Joyce pleaded with Wade, but his beatings continued past nightfall.[7] The defendant tried to hang her from a nail on the wall and repeatedly kicked her when she fell to the floor.[8]

The police first arrived at 3:35 a.m., but left after Wade convinced them that the disturbance was merely an argument.[9] When the po-

1. 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905 (1988). Chief Justice Lucas wrote the majority opinion in which Justices Mosk, Panelli, Arguelles, Eagleson, and Kaufman concurred. Justice Broussard wrote a separate dissenting opinion.

2. *Wade*, 44 Cal. 3d at 981, 750 P.2d at 796, 244 Cal. Rptr. at 907; *see* CAL. PENAL CODE §§ 190-190.6 (West 1988).

3. *Wade*, 44 Cal. 3d at 981, 750 P.2d at 796, 244 Cal. Rptr. at 907.

4. *Id.* This physical abuse included fist and paddle beatings, making the children take cold showers, and forcing Joyce and Alexis to drink their own urine. *Id.*

5. *Id.*

6. *Id.* at 982, 750 P.2d at 797, 244 Cal. Rptr. at 908.

7. *Id.* The defendant drank a full bottle of wine during the beating and shouted that he was "Michael the Archangel" and was going to kill Joyce since she was the devil. *Id.*

8. *Id.*

9. *Id.* The police stayed for fifteen minutes. *Id.*

lice arrived a second time with the paramedics, Joyce was dead.[10] Wade surrendered to the authorities, saying, "Here I am. I'm the one you want. I guess I hit her too hard. I guess I hit her too hard."[11]

Several psychiatrists were engaged by both the prosecution and the defense to evaluate Wade's mental state and the viability of an insanity defense.[12] The psychiatrists' investigations revealed that the defendant had been molested by his mother's boyfriend at a very young age.[13] The doctors found multiple personas within Wade's psyche in addition to his own "mild-mannered, polite, soft-spoken and cooperative" personality.[14] One personality, "Othello," was described as "boisterous, arrogant, vulgar and violent; [disliking] Melvin intensely."[15] "Joe," another personality, was a "devil in training, waiting around for a body to occupy." "Joe," described as "weak, friendly, soft-spoken, mischievous and devilish," was the personality who ultimately submitted to the authorities.[16] "Michael the Archangel," was "angelic, weak and mild" and challenged Othello's influence over Wade.[17] The psychiatrists, making individual determinations, concluded that Wade either had a multiple personality or suffered from "possession syndrome." Additionally, some concluded that Wade was legally insane and a pathological liar.[18] Other witnesses testified that the defendant had a tendency to become violent, citing incidents of child abuse.[19]

Wade testified at the penalty phase of the trial that: he could not remember Joyce's death;[20] he did not recall inflicting any physical punishment on the children; and had no recollection of events leading up to the murder.[21]

III. THE MAJORITY OPINION

A. The Guilt Phase

The defense asserted that five reversible errors occurred during

10. *Id.* at 983, 750 P.2d at 797, 244 Cal. Rptr. at 908.

11. *Id.* Wade was arrested and in his statement to the police, admitted to most of his violent actions. *Id.*

12. *Id.* at 983-85, 750 P.2d at 797, 244 Cal. Rptr. at 909-10.

13. *Id.* at 983, 750 P.2d at 798, 244 Cal. Rptr. at 909. Wade had previously undergone psychological counseling and attempted suicide on three occasions. *Id.*

14. *Id.* at 984, 750 P.2d at 798, 244 Cal. Rptr. at 909.

15. *Id.* Othello, who was supposedly born in Greece and was known as the "Son of Fire" or "Son of Satan," was the devil's assassin, employed by the council of twelve archdemons to kill Irabell. *Id.*

16. *Id.* Joe, according to the court, "fouled up his part of the assignment." *Id.*

17. *Id.* The doctors learned that Michael is strongest on Sundays but could not prevent Joyce's death because it occurred on Saturday, Othello's strongest day. *Id.*

18. *Id.* at 984-85, 750 P.2d at 798-99, 244 Cal. Rptr. at 909-10.

19. *Id.* at 985-86, 750 P.2d at 799, 244 Cal. Rptr. at 909-10.

20. *Id.* at 986, 750 P.2d at 799, 244 Cal. Rptr. at 910.

21. *Id.*

the guilt phase of the proceedings: 1) denial of Wade's constitutional right to effective assistance of counsel; 2) improper admission of rebuttal evidence which demonstrated prior history of non-charged child abuse; 3) insufficient evidence of torture; 4) the unconstitutional vagueness of the heinous, atrocious, or cruel special circumstance; and 5) the unconstitutionally vague and overbroad torture-murder special-circumstance.

1. Denial of effective assistance of counsel

The court initially noted that Wade was entitled to a "proper argument on the applicable law in his favor."[22] Nevertheless, his attorney's candor concerning the inhumane nature of the crime, did not necessarily mean that Wade received ineffective assistance of counsel.[23] The court stated that "in light of the overwhelming evidence of his client's guilt, trial counsel had little choice but to candidly acknowledge guilt, concede the heinous nature of the offense, and concentrate instead on convincing the jury of the legitimacy of the defendant's mental defenses."[24] Defense counsel's open acknowledgement of the cruel crime, his decision to focus on the question of sanity, and his decision to plead for innocence rather than a lesser sentence did not constitute ineffective assistance of counsel.[25] Following *People v. Jackson*,[26] the court reasoned that complete candor with a jury constitutes an appropriate trial strategy and does not fall under the rubric of ineffective assistance of counsel.[27]

2. Improper admission of rebuttal evidence

The court held that the trial court properly admitted evidence of Wade's prior, uncharged acts of child abuse concerning his twin

22. *Id.* at 989, 750 P.2d 801, 244 Cal. Rptr. at 910.

23. *Id.* at 988, 750 P.2d 801, 244 Cal. Rptr. at 912.

24. *Id.* (citing People v. Jackson, 28 Cal. 3d 264, 292-93, 618 P.2d 149, 161, 168 Cal. Rptr. 603, 615 (1980)); *see also* People v. Ratliff, 41 Cal. 3d 675, 697, 715 P.2d 665, 678, 224 Cal. Rptr. 705, 717-18 (1986) (defense counsel's admission that defendant committed burglary not the equivalent of guilty plea).

25. *See generally* Comment, *A Coherent Approach to the Ineffective Assistance of Counsel Claims*, 71 CALIF. L. REV. 1516 (1983); Note, *Maxwell v. Superior Court: Buying Counsel of Choice or Ineffective Assistance?*, 71 CALIF. L. REV. 1348 (1983); Comment, *Standards to Guarantee Effective Assistance of Counsel*, 8 SANTA CLARA L. REV. 108 (1987). *See also* 21A AM. JUR. 2D *Criminal Law* §§ 984-987 (1981); 19 CAL. JUR. 3D *Criminal Law* §§ 2167-2178 (1954).

26. 28 Cal. 3d 264, 292-93, 618 P.2d 149, 161, 168 Cal. Rptr. 603, 615 (1980).

27. *Wade*, 44 Cal. 3d at 988-89, 750 P.2d at 801, 244 Cal. Rptr. at 912.

sons.[28] Proper admission of circumstantial evidence concerning non-charged crimes is subject to three factors: "1) the *materiality* of the fact sought to be proved or disproved; 2) the *tendency* of the uncharged crime to prove or disprove the material fact; and 3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence."[29] This test, in effect, applies the probative value versus prejudicial effect test of section 352 of the Evidence Code.[30] The court continued that "[t]o be relevant, an uncharged offense must tend logically, naturally and by reasonable inference to prove the issue(s) on which it is offered."[31] This evidence was deemed relevant since the prosecution had to prove "specific intent to kill as well as premeditation and deliberation."[32]

The court found that the evidence of prior acts of child abuse was probative both as to whether Wade had the requisite intent to commit the crime, and under which personality he acted at the time of the crime.[33] The evidence was relevant because it tended to prove that Melvin Wade, not a different personality, killed Joyce since Wade had committed prior acts of child abuse.[34] The court rejected the defendant's contention that the child abuse evidence was cumulative. Lay testimony and expert testimony are manifestly different.[35]

The court upheld the trial court's determination that the probative value of the proferred evidence outweighed its prejudicial effect.[36]

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28. *Id.* at 989-93, 750 P.2d at 801-04, 244 Cal. Rptr. at 912-15.

29. *Id.* at 990, 750 P.2d at 802, 244 Cal. Rptr. at 913 (quoting People v. Thompson, 27 Cal. 3d 303, 315, 611 P.2d 883, 888, 165 Cal. Rptr. 289, 294 (1980) (emphasis in original)). For restrictions in the use of rebuttal evidence, see 3 B. WITKIN, CALIFORNIA EVIDENCE, §§ 1732-1734 (3d ed. 1986). As for evidence concerning prior acts, see 1 B. WITKIN, CALIFORNIA EVIDENCE, §§ 391-393 (3d ed. 1986). *See generally* Annotation, *Court's rights in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant*, 96 A.L.R. 2d 768 (1964).

30. CAL. EVID. CODE § 352 (West 1966). *See also* People v. Green, 27 Cal. 3d 1, 24-26, 609 P.2d 468, 481-82, 164 Cal. Rptr. 1, 14-15 (1980) (court must explicitly determine that the risk of undue prejudice does not outweigh the probative value of the evidence).

31. *Wade*, 44 Cal. 3d at 990, 750 P.2d at 802, 244 Cal. Rptr. at 913 (citing People v. Alcala, 36 Cal. 3d 604, 631, 685 P.2d 1126, 1141, 205 Cal. Rptr. 775, 790 (1984)). The court also stated "that if a person acts similarly in similar situations, he probably harbors the same intent in each instance." *Wade*, 44 Cal. 3d at 990, 750 P.2d at 802, 244 Cal. Rptr. at 913 (quoting People v. Thompson, 27 Cal. 3d 303, 319, 611 P.2d 883, 891, 165 Cal. Rptr. 219, 297 (1980)).

32. *Wade*, 44 Cal. 3d at 990, 750 P.2d at 807, 244 Cal. Rptr. at 913; *see also* California Jury Instructions, Criminal (CALJIC), No. 8.20 (4th ed. 1979) [hereinafter CALJIC] (deliberate and premeditated murder); 1 B. WITKIN, CALIFORNIA CRIMES §§ 298-302 (2d ed. 1963 & Supp. 1985); Annotation, *Modern Status of the Rules Requiring Malice "Aforethought," "Deliberation," or "Premeditation," as Elements of Murder in the First Degree*, 18 A.L.R. 961 (1932).

33. *Wade*, 44 Cal. 3d at 991, 750 P.2d at 802-03, 244 Cal. Rptr. at 913-14.

34. *Id.* at 991, 750 P.2d at 803, 244 Cal. Rptr. at 914.

35. *Id.* at 992, 750 P.2d at 803, 244 Cal. Rptr. at 914.

36. *Id.* at 992, 750 P.2d at 803-04, 244 Cal. Rptr. at 914-15; *see also* CAL. EVID. CODE § 352 (West 1966 & Supp. 1988); People v. Green, 27 Cal. 3d 1, 24-26, 609 P.2d 468, 480-

Such lower court rulings are overturned only for abuse of discretion.[37]

3. Insufficient evidence of torture

The court also rejected Wade's claim that insufficient evidence was introduced to support a finding of torture. First, the court indicated that since this objection was first raised in a supplemental brief following a petition for rehearing, it was waived.[38] Second, the court noted that even if the objection was timely raised, there was sufficient evidence to sustain a finding of intent to torture.[39]

4. Constitutionality of the heinous, atrocious, or cruel special-circumstance

The court held that the "heinous, atrocious or cruel" special-circumstance finding by the jury had to be set aside[40] as it was unconstitutionally vague in light of *People v. Superior Court (Engert)*.[41] Nevertheless, the court found this error harmless since the defendant was properly convicted under the torture-murder special-circumstance.[42]

83, 164 Cal. Rptr. 1, 14-16 (1980) (where trial court failed to determine whether risk of undue prejudice concerning incriminating testimony substantially outweighed probative value of evidence).

37. *Wade*, 44 Cal. 3d at 992, 750 P.2d at 803-04, 244 Cal. Rptr. at 914-15. *See, e.g.*, People v. Northrop, 132 Cal. App. 3d 1027, 1042, 182 Cal. Rptr. 147, 205 (1982) (trial court did not abuse its discretion in excluding incriminating statements as hearsay in second-degree murder case); People v. Wein, 69 Cal. App. 3d 79, 90, 137 Cal. Rptr. 814, 820 (1977) (trial court properly admitted evidence of prior offenses demonstrating the defendant's methodology and behavior pattern in perpetrating crimes). *See also* CAL. CONST. art. VI, § 13; CAL. EVID. CODE §§ 352-354 (West 1966 & Supp. 1988).

38. *Wade*, 44 Cal. 3d at 992, 750 P.2d at 804, 244 Cal. Rptr. at 914; *see* 9 B. WITKIN, CALIFORNIA PROCEDURE, § 684 (3d ed. 1985). *See, e.g.*, Brown v. Superior Court, 137 Cal. App. 3d 778, 782, 187 Cal. Rptr. 324, 326 (1982) (appellate court need not consider contentions made for the first time on petition for rehearing).

39. *Wade*, 44 Cal. 3d at 993, 750 P.2d at 804, 244 Cal. Rptr. at 915; *see* CAL. PENAL CODE § 189 (West 1988); 1 B. WITKIN, CALIFORNIA CRIMES §§ 307-309 (2d ed. 1963 & Supp. 1985); CALJIC, No. 8.24 (murder by torture); *but see* People v. Steger, 16 Cal. 3d 539, 549, 546 P.2d 665, 671, 128 Cal. Rptr. 161, 167 (1976) (beating stepchild as act of discipline did not constitute murder by torture).

40. *Wade*, 44 Cal. 3d at 993, 750 P.2d at 804, 244 Cal. Rptr. at 915; *see* CAL. PENAL CODE § 190.2(a)(14) (West 1988).

41. 31 Cal. 3d 797, 806, 647 P.2d 76, 81, 183 Cal. Rptr. 800, 805 (1982).

42. *Wade*, 44 Cal. 3d at 998, 750 P.2d at 807, 244 Cal. Rptr. at 918-19 (citing People v. Allen, 42 Cal. 3d 1222, 1276-80, 799 P.2d 115, 148-52, 232 Cal. Rptr. 849, 882-86 (1986).

5. Constitutionality of the torture-murder special-circumstance

The court determined that, despite the absence of explicit instructions, the jurors understood that they must believe that Wade intended to torture Joyce to find him guilty of torture-murder. Neither counsel told the jury that intent to torture was unnecessary; and moreover, the prosecutor stated that the torture-murder special-circumstance required an intent to "cause cruel pain."[43] Since instructions were given on torture-murder, it was unlikely that the jury did not comprehend its required elements.[44]

B. The Penalty Phase

The defense raised objections to seven potential errors that occurred during the penalty phase of the proceedings: 1) improper usage of "no sympathy" instruction; 2) ineffective assistance of counsel during closing arguments; 3) invalid findings of special circumstances; 4) improper instruction to "disregard consequences" of the verdict; 5) failure to delete extraneous mitigating factors from the standard penalty phase instructions; 6) improper usage of incorrect sentencing instructions; and 7) the unconstitutionality of the 1978 death penalty law.

1. Improper usage of "no sympathy" instructions

Admitting that "no sympathy" jury instructions are not favored, the court observed that the use of such instructions "require [the appellate court] to review the record in each case to determine whether the jury instructions, taken as a whole, and read in conjunction with the jury arguments, adequately informed the jury of its responsibility to consider all of the mitigating evidence."[45] Having done so, the court rejected the defendant's assertion that the jurors failed to comprehend that sympathy may still be considered when determining the appropriate penalty.[46] The court determined that the jury was not misled by the instruction since both prosecution and defense counsel argued its impact.[47]

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43. *Wade*, 44 Cal. 3d at 994-95, 750 P.2d at 805, 249 Cal. Rptr. at 916.

44. *Id.* at 994-95, 750 P.2d at 805, 249 Cal. Rptr. at 916.

45. *Id.* at 996, 750 P.2d at 806, 244 Cal. Rptr. at 917 (citing California v. Brown, 479 U.S. 538, 546 (1987) (O'Connor, J., concurring). *See e.g.*, People v. Ghent, 43 Cal. 3d 739, 777, 739 P.2d 1250, 1275, 239 Cal. Rptr. 82, 107 (1987).

46. *Wade*, 44 Cal. 3d at 997, 750 P.2d at 807, 244 Cal. Rptr. at 918; *see also* CALJIC No. 1.00 (The jury instruction reads: "As jurors, you may not be influenced by pity for a defendant or by prejudice against him. . . . You must not be swayed by mere sentiment, conjecture, *sympathy*, passion, prejudice, public opinion, or public feeling.") (emphasis added).

47. *Wade*, 44 Cal. 3d at 996-97, 750 P.2d at 806-07, 244 Cal. Rptr. at 917-18.

2. Ineffective assistance of counsel during closing arguments

Referring to the previous discussion of Wade's guilt phase objections, the court summarily dismissed his contention that he was denied effective assistance of counsel. While the majority did not quote the defense counsel's alleged advocacy of the defendant's death during his closing argument,[48] it nevertheless concluded that any statement constituted a reasonable tactical decision, and was not "tantamount to advocating his client's death."[49]

3. Invalid findings of special-circumstance

The court, having previously determined the "heinous" murder special-circumstance unconstitutional and the torture-murder special-circumstance valid, summarily rejected Wade's contentions that the "heinous" finding prejudicially affected the jury's verdict.[50] Further, the court stated any error was harmless.[51]

4. Instruction to "disregard consequences" of the verdict

The court briefly noted that although the usage of a "disregard consequences" instruction had been found improper at the penalty phase, this instruction is proper if the jury understood the "grave consequences of its penalty decision."[52] Such a finding supports a conclusion that the instruction was harmless.[53] Finally, the court in-

48. Counsel stated:

> I just want to conclude with, considering that the disorder, the emotional disturbance that the evidence has suggested to you by way of the physicians in this case and the psychologists, I don't think that Melvin Wade, Melvin Meffery Wade, can actually, can be said to lose this case. As has been expressed to me by Melvin on many occasions, he can't live with that beast from within any longer and if in your wisdom you think the appropriate punishment is death, you may be also giving an escape once again by analogy the gift of life to Melvin Meffery Wade to be free from this horror that he and only he knows so well.

Id. at 1004, 750 P.2d at 812, 244 Cal. Rptr. at 923 (Broussard, J., dissenting).

49. *Id.* at 998, 750 P.2d at 807, 244 Cal. Rptr. at 918.

50. *Id.; cf.* People v. Allen, 42 Cal. 3d 1222, 1281-82, 729 P.2d 115, 152-53, 232 Cal. Rptr. 849, 886-87 (1986) (improperly allowing a jury to consider eleven special circumstances instead of three was not "substantial error" requiring reversal of death penalty given prosecution's overwhelming evidence and slight emphasis placed on those special circumstances).

51. *Wade*, 44 Cal. 3d at 998, 750 P.2d at 807, 249 Cal. Rptr. at 918.

52. *Id.* at 998, 750 P.2d at 808, 244 Cal. Rptr. at 919; *see also* People v. Miranda, 44 Cal. 3d 57, 102 n.21, 744 P.2d 1127, 1155 n.21, 241 Cal. Rptr. 594, 622 n.21 (1987) ("disregard consequences" instruction was proper where jury also told that the determination of defendant's life or death depended upon its decision); CALJIC No. 1.00.

53. *Wade*, 44 Cal. 3d at 998, 750 P.2d at 808, 249 Cal. Rptr. at 919.

terpreted the jury instruction not as a "disregard consequences" instruction but as a "just" verdict instruction.[54]

5. Extraneous mitigating factors in the standard penalty phase instructions

Following *People v. Ghent*,[55] the court rejected the defendant's assertion that the failure to delete extraneous mitigating factors from the standard penalty phase instructions was prejudicial error.[56]

6. Improper usage of incorrect sentencing instruction

The court found that the jury instructions did not mislead the jury because the jury knew it had the appropriate authority to decide the sentence.[57] The court noted the rejection of this argument in earlier cases,[58] and the record failed to demonstrate that the jury was improperly misled.[59]

7. Constitutionality of the 1978 death penalty law

Recognizing that all previous attacks on the constitutionality of the 1978 death penalty law have been rejected,[60] the court dismissed this contention with little discussion.[61] According to the majority, death was not a "disproportionate penalty 'for the parent who disciplines his child to death.' "[62] The court affirmed the death penalty because this case was not akin to a situation where a "parent overreacts in heat of anger toward a child" since Wade had "ample time to reflect upon the nature of his acts."[63]

IV. JUSTICE BROUSSARD'S DISSENTING OPINION

Justice Broussard wrote a lengthy dissent calling for complete reversal based on the denial of Wade's constitutional right to effective assistance of counsel.[64] Justice Broussard emphasized four areas

54. *Id.*
55. 43 Cal. 3d 739, 776-77, 739 P.2d 1250, 1274-75, 239 Cal. Rptr. 82, 106-07 (1987).
56. *Wade*, 44 Cal. 3d at 998-99, 750 P.2d at 808, 244 Cal. Rptr. at 918; *see also* CALJIC No. 8.84.1 (penalty trial factors for consideration).
57. *Wade*, 44 Cal. 3d at 999, 750 P.2d at 808, 244 Cal. Rptr. at 919.
58. *Id.* (citing People v. Allen, 42 Cal. 3d 1222, 1276-80, 729 P.2d 115, 148-52, 232 Cal. Rptr. 849, 882-86 (1986)); People v. Brown, 40 Cal. 3d 512, 726 P.2d 516, 230 Cal. Rptr. 834 (1985); *see also* CALJIC No. 8.84.2 (penalty trial concluding instruction).
59. *Wade*, 44 Cal. 3d at 999, 750 P.2d at 808, 244 Cal. Rptr. at 919.
60. *Id.* at 999, 750 P.2d at 809, 244 Cal. Rptr. at 919 (citing People v. Rodriguez, 42 Cal. 3d 730, 717-79, 726 P.2d 113, 143-44, 230 Cal. Rptr. 667, 697-98 (1986); *see also* CAL. CONST. art. I, § 27 (death penalty deemed not cruel nor unusual punishment).
61. *Wade*, 44 Cal. 3d at 999, 750 P.2d at 808, 244 Cal. Rptr. at 919.
62. *Id.*
63. *Id.*
64. *Id.* at 1000-05, 750 P.2d at 809-12, 244 Cal. Rptr. at 920-23 (Broussard, J., dis-

where the defendant was denied effective assistance of counsel. First, Wade's counsel failed to "zealously" represent him and, instead, argued against him.[65]

Second, the defendant's counsel failed to raise several arguments at the guilt phase closing argument.[66] Wade's counsel merely "waxed eloquently about the horrendous details of the crime, emphasized the tragic results, and repeatedly alluded to his appointed status"[67] instead of arguing that the defendant did not possess the requisite intent.

Third, counsel's complete silence at the sanity phase also denied Wade effective assistance of counsel.[68] Counsel failed to argue the issue of insanity, improperly reasoning that any arguments were fruitless since guilt had been previously determined.[69]

Finally, counsel's closing argument at the penalty phase had the effect of advocating Wade's death. According to Broussard, the defense counsel's statement that a death penalty may give a "gift of life to Melvin to be free from this horror,"[70] was improper.

In summary, Justice Broussard's dissent notes that rather than adequately defending Wade, his counsel "argued against him at the guilt phase of the trial, stood mum at the sanity phase, and, at the penalty phase, virtually commended him to the gas chamber."[71] Additionally, Justice Broussard felt that Wade's counsel was a sort of "second prosecutor . . . offering the jurors an excuse for executing the defendant. . . ."[72]

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senting). His dissent parallels that of former Chief Justice Bird before the rehearing was granted. *Id.* at n.1.

65. *Id.* at 1000-02, 750 P.2d at 809-11, 244 Cal. Rptr. at 920-21 (Broussard, J., dissenting); *see, e.g.*, People v. McKenzie, 34 Cal. 3d 616, 631, 668 P.2d 769, 778-79, 194 Cal. Rptr. 462, 472 (1983); People v. Diggs, 177 Cal. App. 3d 958, 970, 223 Cal. Rptr. 361, 368 (1986); People v. Cropner, 89 Cal. App. 3d 716, 720, 152 Cal. Rptr. 555, 557 (1979); *see also* U.S. CONST. amends. VI, XIV; CAL. CONST. art. I, § 15.

66. *Wade*, 44 Cal. 3d at 1002-03, 750 P.2d at 811, 244 Cal. Rptr. at 921-22 (Broussard, J., dissenting).

67. *Id.* at 1003, 750 P.2d at 811, 244 Cal. Rptr. at 922.

68. *Id.* at 1003-04, 750 P.2d at 811-12, 244 Cal. Rptr. at 922-23 (Broussard, J., dissenting); *see also* U.S. CONST. amends. VI, XIV; CAL. CONST. art. I, § 15.

69. *Wade*, 44 Cal. 3d at 1003-04, 750 P.2d at 811-12, 249 Cal. Rptr. at 922-23 (Broussard, J., dissenting).

70. *Id.* at 1004, 750 P.2d at 812, 244 Cal. Rptr. at 923 (Broussard, J., dissenting).

71. *Id.* at 1000, 750 P.2d at 809, 244 Cal. Rptr. at 920 (Broussard, J., dissenting).

72. *Id.* at 1004, 750 P.2d at 812, 244 Cal. Rptr. at 923 (Broussard, J., dissenting).

V. CONCLUSION

Although *Wade* offers no radical departure from California criminal law, it alarmingly signals that the conservative judicial trend in California is now fully entrenched. The court hints that the death penalty convictions will not be overturned on technical grounds if plausible harmless error arguments can be made. Additionally, the cumulative effect of multiple harmless errors appears to be insignificant.

TIMOTHY MICHAEL DONOVAN
LISA ELANE SLATER

I. *Exclusion of evidence of a defendant's character offered for the mitigation of a death penalty is federal constitutional error:* **People v. Lucero.**

I. INTRODUCTION

In *People v. Lucero*,[1] the court affirmed the judgment of guilt, and the case was remanded for a hearing of the penalty stage since mitigating evidence had been improperly excluded.

The court found *Skipper v. South Carolina*[2] controlling. The United States Supreme Court, in *Skipper*, held that there was an absolute right in a capital trial to produce all relevant evidence for the mitigation of punishment.[3] Following this precedent, the *Lucero* court held that evidence of the defendant's likelihood of adjustment to prison life and the testimony diagnosing post-traumatic stress syndrome were improperly and prejudicially excluded.[4]

II. FACTUAL BACKGROUND

On April 12, 1980, two young girls, ages seven and ten, were discovered missing. They had been on their way to the park. While passing defendant Phillip Louis Lucero's house, his goose cackled and he approached the girls saying the goose would not hurt them. The defendant was seen approaching the girls in front of his yard. After the

1. 44 Cal. 3d 1006, 750 P.2d 1342, 245 Cal. Rptr. 185 (1988). Justice Broussard delivered the majority opinion with Chief Justice Lucas, and Justices Panelli, Arguelles, Eagleson, and Kaufman concurring. Justice Mosk wrote a separate opinion advocating the use of the statutory power of sections 1181(7) and 1260 of the Penal Code. CAL. PENAL CODE §§ 1181(7) (West 1985), 1260 (West 1982). *See infra* notes 35-45 and accompanying text.

2. 476 U.S. 1 (1986) (testimony of two jailers and one "regular visitor" sought to be admitted to attest to petitioner's good adjustment to jail life).

3. *Id.* at 4. The *Skipper* court indicated that this principal was embodied in two of its prior opinions: Eddings v. Oklahoma, 455 U.S. 104 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978). 476 U.S. at 4.

4. *Lucero*, 44 Cal. 3d at 1025, 750 P.2d at 1353, 245 Cal. Rptr. at 1956.

girls had been reported missing, a police command post was set up at the park across the street from the defendant's house and helicopters were employed in the search for the girls.

The police at the command post observed a fire in the defendant's house. A search was commenced which revealed human blood stains, pieces of broken glass, gasoline residue, and one of the victim's tennis shoes. The bodies of the two girls were found in a nearby dumpster among broken glass. A search of the defendant's car, as well as the defendant, revealed additional blood stains found to match one of the victims.

Lucero was a Vietnam veteran with a troublesome childhood history. In the penalty phase, Dr. Edward Conolley testified for the defense concerning the defendant's serious psychological problems stemming from his experiences in childhood and Vietnam. According to Dr. Conolley, the defendant's post-traumatic stress syndrome was clearly evident. This included recurrent flashbacks, inability to adjust to life outside of the combat zone, survivor guilt and avoidance of Vietnam discussions. The doctor concluded that the defendant was "quite psychologically impaired"[5] on the date of the homicides.

The doctor also felt that the events on the day of the murders caused a Vietnam flashback resulting in the defendant's explosive behavior. Specifically, the cackling goose triggered memories of the animals of Vietnam, where their agitation often signaled the approach of enemies. Additionally, the helicopters employed in the search for the girls, coupled with the use of loudspeakers, also triggered the alleged flashback.

Lucero was convicted of two counts of first degree murder with a special circumstance finding, one count of arson, and was subsequently sentenced to death. The defendant claimed numerous errors in the jury selection and in the guilt and penalty stages of his trial.

III. JUROR EXCLUSION

The defendant first objected to the exclusion of a prospective juror who claimed that under no circumstances could he vote for the death penalty. The court quickly dismissed this argument under the precedent of *Witherspoon v. Illinois*,[6] *Wainwright v. Witt*,[7] and *People v.*

5. *Id.* at 1026-32, 750 P.2d at 1353-58, 245 Cal. Rptr. at 196-201.

6. 391 U.S. 510, 522 n.21 (1968). The United States Supreme Court has held that a juror may be excluded for cause if it is "unmistakenly clear . . . that they would *auto-*

Ghent.[8] The juror was thus found to be properly excluded.[9]

IV. GUILT STAGE

A. *Warrantless Entries*

The defendant's argument of illegal entry of his home was similarly dismissed. The defendant claimed that all evidence found in his house, car, and clothing should have been excluded as the fruits of an improper search. The court determined that the situation was exigent because of the fire and missing children in the immediate area. The exigent circumstances exception to the warrant requirement was thus held to clearly apply as to the initial entries.[10]

The later warrantless entry by the homicide investigator was also examined. The court held that this detective's observations were of no significance since he did not testify. The court also noted that within thirty minutes of the investigation's warrantless entry, the defendant consented to a full-scale search.[11] Thus, "[t]he consensual searches provided an independent basis to seize the challenged evidence."[12]

B. *Evidence and Instructions of Premeditation and Deliberation*

The defendant first contended that the evidence was insufficient to support a finding of premeditation and deliberation as a matter of law. The court used the three categories of *People v. Anderson*[13] to sustain the jury's finding. The court conceded that no one factor was especially strong. However, when viewed in totality and in circum-

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matically vote against the imposition of capital punishment without regard to any evidence. . . ." *Id.* (emphasis in original).

7. 469 U.S. 412 (1985). The test for bias under *Witt* is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

8. 43 Cal. 3d 739, 767-68, 739 P.2d 1250, 1268, 239 Cal. Rptr. 82, 100-01 (1987) (trial court's determination of bias where conflicting responses elicited not to be disturbed on appeal).

9. *Lucero*, 44 Cal. 3d at 1016, 750 P.2d at 1346, 245 Cal. Rptr. at 189.

10. *Id.* at 1017, 750 P.2d at 1347, 245 Cal. Rptr. at 190; *see* People v. Ramey, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (1976), *cert. denied*, 429 U.S. 929 (1976). For a discussion of the exigent circumstances exception in the child protection context, see Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493, 507-17 (1988).

11. *Lucero*, 44 Cal. 3d at 1018, 750 P.2d at 1347-48, 245 Cal. Rptr. at 191.

12. *Id.* at 1018, 750 P.2d at 1348, 245 Cal. Rptr. at 191. *See* Special Project, *Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987*, 76 GEO. L.J. 521, 704-05 (1988) (discussion of inevitable discovery doctrine).

13. 70 Cal. 2d 15, 26-27, 447 P.2d 942, 949, 73 Cal. Rptr. 550, 557 (1968). The three categories of evidence are: 1) facts showing planning activity; 2) facts suggesting motive; and 3) facts about the manner of killing which suggests a preconceived design. *Id.*

stances favorable to the prosecution, the determination was sustained. Specifically, the court found considerable evidence of active planning which is recognized as " 'the most important prong of the *Anderson* test.' "[14] This, coupled with the less extensive evidence of motive and preconceived design, provided sufficient evidence. The court noted that a finding beyond a reasonable doubt was not required on appeal since the appropriate standard is whether " '*any* rational trier of fact' could have been so persuaded by the evidence presented."[15]

Secondly, Lucero claimed that the trial court's refusal to instruct the jury as to the defendant's requested *Sears* instruction on the amount of evidence required for a first degree murder verdict[16] was reversible error. In *People v. Sears*,[17] this court determined that a defendant has a right to issue jury instructions relating to evidence affecting reasonable doubt or relating certain facts to a particular issue.[18] The defendant's requested instruction, however, did not focus on facts producing a reasonable doubt as to premeditation and deliberation, nor did it apply the reasonable doubt standard to the defendant's argument[19] or to the elements of the crime.[20] Thus, the court found that the instruction was requested simply to incorrectly suggest to the jury that each of the *Anderson* factors must be proven beyond a reasonable doubt to support a first degree murder conviction. The court explained that the *Anderson* factors are correctly used at the appellate level to determine whether a finding of premeditation

14. *Lucero*, 44 Cal. 3d at 1018-19, 750 P.2d at 1348, 245 Cal. Rptr. at 191 (quoting People v. Alcala, 36 Cal. 3d 604, 627, 685 P.2d 1126, 1138, 205 Cal. Rptr. 77, 87 (1984)).

15. *Id.* at 1020, 750 P.2d at 1349, 245 Cal. Rptr. at 192. (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

16. The requested instruction was as follows:

> Evidence of premeditation and deliberation falls into three (3) basic categories:
> (1) Facts showing prior planning activity
> (2) Facts of prior activity suggesting motive
> (3) Facts about the manner of the killing which suggest a preconceived design.
> In order to sustain a first degree murder verdict there must be evidence of all three (3) types of facts or otherwise *extremely strong* evidence of prior planning (type 1) or evidence or motive (type 2) in conjunction with either prior planning (type 1) or manner of killing (type 3).

Id. at 1020, 750 P.2d at 1349, 245 Cal. Rptr. at 192 (citing People v. Sears, 2 Cal. 3d 180, 465 P.2d 847, 84 Cal. Rptr. 711 (1970)).

17. 2 Cal. 3d 180, 465 P.2d 847, 84 Cal. Rptr. 711 (1970).

18. *Id.* at 190, 465 P.2d at 853-54, 84 Cal. Rptr. at 717-18.

19. *See* People v. Adrian, 135 Cal. App. 3d 335, 338, 185 Cal. Rptr. 506, 508 (1982).

20. *See* People v. Rincon-Pineda, 14 Cal. 3d 864, 885, 538 P.2d 247, 262, 123 Cal. Rptr. 119, 134 (1975).

and deliberation is justified and not a required instruction.[21]

C. *Spectator Misconduct*

The last objection during the guilt stage referred to an outburst by one of the victim's mother immediately prior to the jury's leaving for deliberation. Lucero contended that the timing of this outburst made it extremely prejudicial and that it may have informed the jury of facts outside the record. The defendant maintained that this, coupled with the need for sensitivity in a capital trial, warranted a mistrial.

The court, however, recognized the trial court's broad discretion in determining the prejudicial effect of an in-court outburst.[22] Additionally, the court noted that no California case had declared a mistrial based on spectator misconduct.[23] Of the out-of-state cases which were reversed due to spectator misconduct, none involved a single outburst.[24] Thus, the court declared that the prompt admonition by the trial court, coupled with the trial court's broad discretion afforded in spectator misconduct cases, mandated a denial of the defendant's motion for mistrial.[25]

V. PENALTY STAGE

A. *Exclusion of Future Behavior Evidence*

The defendant attempted to bring in evidence relating to his likelihood of adjustment to a prison setting and his unlikelihood of recidivism. The trial court disallowed this testimony under *People v. Murtishaw*.[26] However, the supreme court held that *Murtishaw* was incorrectly applied to this case. The unreliability of dangerousness predictions was acceptable when the prediction forecast an absence of

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21. The court held that the trial court correctly provided the jury with CALJIC No. 8.20's definition of deliberation and premeditated murder and that defendant's additional instruction was therefore not proper. *Lucero*, 44 Cal. 3d 1006, 1021, 750 P.2d 1342, 1350, 245 Cal. Rptr. 185, 193 (1988).

22. *Id.* at 1022, 750 P.2d at 1351, 245 Cal. Rptr. at 194 (citing People v. Slocum, 52 Cal. App. 3d 867, 884, 125 Cal. Rptr. 442, 451 (1975), *cert. denied*, 426 U.S. 924 (1976)).

23. *Id.* at 1023 n.10, 750 P.2d at 1351 n.10, 245 Cal. Rptr. at 194 n.10.

24. *See, e.g.*, Rodriguez v. State, 433 So. 2d 1273, 1276 (Fla. Dist. Ct. App. 1983) (continuous impassioned statements of victim's widow evidencing extreme hostility toward defendant); Price v. State, 149 Ga. App. 397, 399, 254 S.E.2d 512, 513-14 (1979) (excessive interruptions and outbursts by victim's mother); Walker v. State, 132 Ga. App. 476, 208 S.E.2d 350 (1974) (victim's mother seated at prosecution table throughout trial); State v. Stewart, 278 S.C. 296, 301, 295 S.E.2d 627, 630, *cert. denied*, 459 U.S. 828 (1982) (glaring at jury coupled with opinionated remarks about defendant's guilt).

25. The court did note that the trial court's "cursory admonition" was probably deficient and that greater effort should have been expended. However, this was an insufficient reason to declare a mistrial. *Lucero*, 44 Cal. 3d at 1024 n.11, 750 P.2d at 1352 n.11, 245 Cal. Rptr. at 195 n.11.

26. 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981), *cert. denied*, 455 U.S. 922 (1982) (evidence of high likelihood of future violence inadmissible in capital cases as predictions of dangerousness are subject to overprediction).

future violence, whereas the unreliability in *Murtishaw* related to overprediction of dangerousness.[27]

More importantly, the trial court's error was also held to be a violation of the eighth amendment.[28] The United States Supreme Court held that "any aspect of a defendant's character . . . that the defendant proffers as a basis for a sentence less than death" must be admitted.[29] Furthermore, in a closely analogous case, the United States Supreme Court determined that such evidence directly relates to mitigation of punishment and, as such, may serve as a basis for a lesser sentence.[30] The Court held that the exclusion of petitioner's future behavior evidence was reversible error.[31]

The court noted that creating a distinction between evidence of future behavior as in the *Skipper* case, and evidence of past behavior used to infer future behavior as occurred in this case, was "elusive"[32] and thus improper. Additionally, the court noted that the allowance of Dr. Conolley's testimony regarding Lucero's past behavior in prison and current mental condition did not render the exclusion harmless as cumulative testimony. As determined in *Valle v. Florida*,[33] there is a considerable distinction between evidence allowing the jury to infer future good behavior and expert opinion testimony. As the doctor's testimony did not discuss future behavior, the exclusion of the testimony regarding likelihood of adjustment was prejudicial error.[34]

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27. *Lucero*, 44 Cal. 3d at 1026, 750 P.2d at 1353, 245 Cal. Rptr. at 196; *see Murtishaw*, 29 Cal. 3d at 771, 631 P.2d at 469, 175 Cal. Rptr. at 760-61. *See generally* Goodman, *Demographic Evidence in Capital Sentencing*, 39 STAN. L. REV. 499, 523-27 (1987).

28. U.S. CONST. amend. VIII.

29. Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)); *see also* Hitchcock v. Dugger, 107 S. Ct. 1821 (1987) (jury improperly instructed to consider only those mitigating factors which were specifically enumerated in the Florida death penalty statute); People v. Zimmerman, 36 Cal. 3d 154, 158, 680 P.2d 776, 777-78, 202 Cal. Rptr. 826, 827-28 (1984) (mitigating circumstances must be considered before death penalty can be imposed). *See generally* Goodman, *Demographic Evidence in Capital Sentencing*, 39 STAN. L. REV. 499 (1987).

30. Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (defendant's introduction of testimony by two jailers and one "regular visitor" to show his positive adjustment to life in jail held related to mitigation of punishment).

31. *Id.* at 8.

32. *Lucero*, 44 Cal. 3d at 1027, 750 P.2d at 1354, 245 Cal. Rptr. at 197 (quoting *Skipper*, 476 U.S. at 7).

33. 502 So. 2d 1225, 1226 (Fla. 1987).

34. *Lucero*, 44 Cal. 3d at 1029, 750 P.2d at 1355, 245 Cal. Rptr. at 198.

B. *Exclusion of Post-Traumatic Stress Syndrome Evidence*

A similar analysis was undertaken with regard to the defendant's attempt to proffer the testimony of Thomas Wulbrecht, a counselor at Pettis Veterans Hospital with specialized training in post-traumatic stress syndrome. Wulbrecht opined that the syndrome probably caused the explosive behavior the day of the murders. The trial court disallowed the counselor's opinion and testimony as to the existence of the syndrome. Because Wulbrecht was unable to relate the defendant's mental condition to the offense in question, the testimony was held to be "sheer speculation."[35]

The court found the exclusion inconsistent with *Lockett, Eddings*, and *Skipper* and held that the defendant was entitled to put forth Wulbrecht's testimony as a factor to be considered in mitigation.[36] The court noted that Wulbrecht's description of the defendant's condition was particularly relevant and improperly excluded.

Next, the court discussed whether the testimony was cumulative since Dr. Conelley had already testified to similar issues. This question was answered in the negative due to the existing debate on whether the syndrome in fact exists, the questioned reliability of a diagnosis, and the fact that Wulbrecht did not have the "professional interest"[37] that Dr. Conelley had. The court concluded that under *Chapman v. California*,[38] the exclusion of mitigating evidence was not harmless error[39] and thus mandated a reversal and remand of the penalty stage. However, the judgment as to guilt and the finding of special circumstances were affirmed.

VI. JUSTICE MOSK'S SEPARATE OPINION

In an emotional opinion, Justice Mosk opined that Lucero did "not deserve death at the hands of the society he faithfully served."[40] The Justice perceived a "macabre irony in the fact that the society on

35. *Id.* at 1030, 750 P.2d at 1356, 245 Cal. Rptr. at 199.

36. *Id.* at 1030-31, 750 P.2d at 1356, 245 Cal. Rptr. at 199-200.

37. The prosecution had emphasized Conelley's status as a "hired gun" who would testify according to defendant's wishes. This "professional interest" did not exist with Wulbrecht who worked every day with veterans suffering from the stress syndrome. *Id.* at 1031, 750 P.2d at 1356, 245 Cal. Rptr. at 199-200.

38. 386 U.S. 18 (1967).

39. Although *Skipper, Eddings*, and *Lockett* were reversed without a determination of harmless error, the United States Supreme Court in the analogous case of Hitchcock v. Dugger, 107 S. Ct. 1821, 1824 (1987) (jury instructions held improper where jury instructed to disregard consideration of relevant mitigating evidence) suggested that such a determination might be warranted. Thus, the court used the *Chapman* test without deciding whether the determination was necessary. *Lucero*, 44 Cal. 3d at 1032, 750 P.2d at 1357, 245 Cal. Rptr. at 200-01. For a discussion of the applicability of harmless error in death penalty cases, see Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740 (1987).

40. *Lucero*, 44 Cal. 3d at 1034, 750 P.2d at 1358, 245 Cal. Rptr. at 202.

whose behalf Lucero took an undetermined number of lives is now seeking to take his life."[41] His solution was to employ the statutory powers of sections 1181(7)[42] and 1260[43] of the Penal Code to modify or reduce the imposed penalty. Justice Mosk stated that the defendant deserved compassion and this, coupled with the difficulty of retrying a case for which the crime occurred eight years ago, warranted employment of the reduction in sentence powers. The end result would be a modification of the judgment to eliminate the special circumstance finding and the death penalty. These modifications would then accompany the remand for resentencing.

Justice Mosk's solution, however, entails the overruling of a number of past decisions. In fact, the Justice himself listed eight supreme court cases[44] that would have to be overruled in order to implement his solution.[45]

VI. CONCLUSION

Sections 1181(7) and 1260, as interpreted by the supreme court, allow penalties to be modified or reduced where the sentence is in ex-

41. *Id.* at 1033, 750 P.2d at 1358, 245 Cal. Rptr. at 201.

42. CAL. PENAL CODE § 1187(7) (West 1985). Section 1181(7) provides as follows:

> When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed.

CAL. PENAL CODE § 1181(7) (West 1985).

43. CAL. PENAL CODE § 1260 (West 1982). Section 1260 provides as follows:

> The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

CAL. PENAL CODE § 1260 (West 1982).

44. People v. Lookadoo, 66 Cal. 2d 307, 327, 425 P.2d 208, 221, 57 Cal. Rptr. 608, 621 (1967); People v. Mitchell, 63 Cal. 2d 805, 821, 409 P.2d 211, 222, 48 Cal. Rptr. 371, 382 (1966); People v. Howk, 56 Cal. 2d 687, 700, 365 P.2d 426, 433, 16 Cal. Rptr. 370, 377 (1961); People v. Linden, 52 Cal. 2d 1, 26, 338 P.2d 397, 410 (1959); People v. Green, 47 Cal. 2d 209, 235, 302 P.2d 307, 324-25 (1956); People v. Carmen, 43 Cal. 2d 342, 351, 273 P.2d 521, 526 (1954); People v. Dessauer, 38 Cal. 2d 547, 555, 241 P.2d 238, 243 (1952); People v. Thomas, 37 Cal. 2d 74, 77-78, 230 P.2d 351, 353 (1951). Additionally in need of overruling and unmentioned by Justice Mosk include the following: People v. Rittger, 54 Cal. 2d 720, 734-35, 355 P.2d 645, 653-54, 7 Cal. Rptr. 901, 909-10 (1960); People v. Brust, 47 Cal. 2d 776, 791-92, 306 P.2d 480, 488 (1957); People v. Byrd, 42 Cal. 2d 200, 213, 266 P.2d 505, 512 (1954).

45. *Lucero*, 44 Cal. 3d at 1035-36, 750 P.2d at 1359, 245 Cal. Rptr. at 203.

cess of the fixed maximum, where consecutive sentences are improperly imposed, and where other similar errors have occurred.[46] Additionally, these sections allow the appellate court to "reduce the conviction to a lesser degree and affirm the judgment as modified. . . ."[47] However, when the error relates solely to punishment for first degree murder, appellate courts cannot reduce the punishment as the trial court has exclusive jurisdiction in determining punishment.[48]

Mosk's opinion emphasized that none of the cases which have avoided using the statutory powers of modification provided a sufficient rationale for their refusal.[49] This is correct. However, the mere fact that the cases did not discuss their reasons does not mandate the conclusion that none existed. In fact, a compelling justification is the trial court's ability to observe the conduct of the defendant and to hear any presentence information.[50] Taking into account the severity of the punishment in question, good reason exists to leave the discretion to the trial court. The Justice's plea for discretion is thus inappropriate in the death penalty context. The passage of time alone is not compelling enough to violate the trial court's exclusive jurisdiction in determining punishment.

LESLIE GLADSTONE

V. EVIDENCE

A. *Proposition 8's "Truth-in-Evidence" provision dictates the use of federal standards in determining admissibility of statements in violation of Miranda:* **People v. May.**

In *People v. May*, 44 Cal. 3d 309, 748 P.2d 307, 243 Cal. Rptr. 369 (1988), the supreme court denied the defendant's contention that *People v. Disbrow*, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976), requires all statements in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), to be inadmissible at trial for all purposes. The court held that statements obtained in violation of *Miranda* will be admissible at trial for impeachment purposes, thus adopting the federal holding of *Harris v. New York*, 401 U.S. 22 (1971). The court stated that

46. *See* 22 CAL. JUR. 3D (REV) *Criminal Law* §§ 3792-3793 (1985 & Supp. 1988).

47. People v. Edwards, 39 Cal. 3d 107, 118, 702 P.2d 555, 562, 216 Cal. Rptr. 397, 404 (1985).

48. People v. Green, 47 Cal. 2d 209, 235, 302 P.2d 307, 324-25 (1956), *disapproved on other grounds*, People v. Marse, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1963). *See also* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Appeal* § 731 (1963 & Supp. 1985); Hopkins, *Reviewing Sentencing Discretion: A Method of Swift Appellate Action*, 23 UCLA L. REV. 491 (1976).

49. *Lucero*, 44 Cal. 3d at 1035, 750 P.2d at 1359, 245 Cal. Rptr. at 203.

50. *See* Hopkins, *supra* note 48 at 492-93.

Proposition 8, with its "Truth-in-Evidence" provision, nullified the California independent state basis for excluding evidence.

May was arrested after a police investigation of rape related offenses. After being read his *Miranda* rights, May demanded an attorney. *See* 19 CAL. JUR. 3D (REV.) *Criminal Law* §§ 2205-2208. However, the police continued to interrogate him and obtained incriminating testimony suggesting his involvement in the crimes. May pled not guilty to charges of rape and other related crimes. He later moved to have the illegally obtained statements suppressed under *Disbrow*. The evidence was excluded as to the substantive use of the statements; however, the court allowed its use for impeachment purposes. The court held that the federal standard should be applied, notwithstanding California precedent which provided for a greater degree of protection for the accused. The court asserted that Proposition 8 dictated the use of federal law on *Miranda* violations. Thus, *Harris* governed and the pre-trial statements were admissible for impeachment.

Proposition 8, or article I, section 28 of the California Constitution, was enacted in response to voters' concern over California's supposed leniency toward offenders' rights. Coined the Victim Bill of Rights, this provision professed to safeguard victims by ensuring adequate custody, trial, and punishment of felonious offenders. CAL. CONST. art. I, § 28; *see* 17 CAL. JUR. 3D (REV.) *Criminal Law* § 51 (1984). The "Truth-in-Evidence" section was enacted to implement these goals. This provision provides that "relevant evidence shall not be excluded in any criminal proceeding." CAL. CONST. art. I, § 28(d); *see* 21 CAL. JUR. 3D (REV.) *Criminal Law* § 3131 (1985). However, section 28(d) also states in pertinent part that "[n]othing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay. . . ." CAL. CONST. art. I, § 28(d). The defense alleged that section 940 of the Evidence Code, the statute protecting the privilege of self-incrimination, was such an "existing statutory rule of evidence relating to privilege." *See* Kopeny, *The Impact of Proposition 8 on Statements*, 13 W. ST. U.L. REV. 55 (1985). The defense counsel also contended that under section 940 of the Evidence Code and section 28(d) of the California Constitution, the statements were inadmissible as a violation of this privilege. *See* Comment, *Disbrow Confronts Proposition 8: Will Miranda Violative Statements Be Admitted to Trial for Impeachment?*, 17 PAC. L.J. 1337-1360 (1986).

The supreme court, however, disagreed. It maintained that the Evidence Code did not specifically codify remedial measures to cure *Mi-*

randa violations, but dealt only with the right to refuse disclosure. Thus, the law on remedial measures to cure violations was merely judicially created through interpretation of the Evidence Code. The court further held that the "Truth-in-Evidence" provision was adopted to override judicial decisions grounded on deterrence of improper police conduct. The court decided that the language of section 28(d) referred only to "*legislatively* created rules of privilege," such as the attorney-client and physician-patient privileges. Thus, *Disbrow*'s judicial interpretation of the Evidence Code was held nonbinding on the court.

The court thus relied on *Harris*, which stated that the privilege to testify did not encompass a privilege of perjury. *See* 401 U.S. at 225. Thus, the court concluded that no privilege prevented the state from impeaching the defendant.

The court then held that the exception for statutory rules of evidence relating to privilege or hearsay did not encompass the privilege against self-incrimination. However, the only purpose of section 940 of the Evidence Code is to codify judicially created laws on the privilege against self-incrimination. *See People v. Barrios*, 166 Cal. App. 3d 732, 212 Cal. Rptr. 644 (1985); *see also* 19 CAL. JUR. 3D (REV.) *Criminal Law* § 2183 (Supp. 1987). *Disbrow*, by interpreting article I, section 15 of the California Constitution, was such a judicially created law. Section 940 of the Evidence Code incorporated that law into its statutory rule on self-incrimination protection.

The majority's reasoning gives no force of law to Evidence Code section 940. If the drafters of the constitution had intended to completely overrule the exclusionary rules, then their language would have reflected that intent. No such language appears in section 28(d). Rather, the provision clearly states that rules of evidence relating to privilege shall not be affected. The *Harris* rule entices police officers to use illegal means for obtaining statements so that prosecutors may use such evidence to impeach the accused on cross-examination. *May*, 44 Cal. 3d at 333, 748 P.2d at 322, 243 Cal. Rptr. at 384 (Mosk, J., dissenting). A remaining option for a defendant in this situation, of course, is to not take the stand—an action likely to have a negative effect on the jury.

LESLIE GLADSTONE

B. *When substantial evidence indicates that a defendant is incompetent to stand trial, section 1368 of the Penal Code requires a full competency hearing and failure to hold the hearing renders all subsequent criminal proceedings void:* **People v. Hale.**

In *People v. Hale*, 44 Cal. 3d 531, 749 P.2d 769, 244 Cal. Rptr. 114 (1988), the supreme court held that when substantial evidence indicates that a defendant is incompetent to stand trial, failure by the trial court to hold a full competency hearing in accordance with section 1368 of the Penal Code renders all subsequent criminal proceedings void. Moreover, the court held that once the defendant's mental competency has been doubted, the matter becomes jurisdictional and cannot be waived by the defendant or defense counsel. Finally, the court held that if a trial court has properly ordered a competency hearing, it cannot vacate the order, *sub silentio*.

Hale was accused of murdering two elderly men. At both the preliminary hearing and arraignment, the defendant exhibited abnormal and bizarre behavior which led the court to express serious doubt as to his mental competence. The court suspended the arraignment proceedings pending a competency hearing. The defendant was first examined by two psychiatrists; each offered different opinions as to the defendant's competency. A third psychiatrist was appointed and opined that although the defendant did suffer from paranoid schizophrenia, he was currently in remission and was therefore competent to stand trial. The court then appointed two additional psychiatrists to examine the defendant. These psychiatrists also disagreed regarding the defendant's competence. The second psychiatrist found the defendant competent and concluded that prior examination had occurred before the defendant's treatment had taken effect. After receiving these conflicting reports, the court failed to hold the competency hearing and the case proceeded to trial without objection from defense counsel. The defendant was subsequently convicted of both murders and was sentenced to death. Under section 1239(b) of the Penal Code, the defendant was automatically entitled to an appeal and the court reversed the conviction.

In the seminal case of *Pate v. Robinson*, 383 U.S. 375 (1966), the United States Supreme Court held that the conviction of an individual who is legally incompetent to stand trial is a violation of the due process right to a fair trial. *Id.* at 378, 385. *See generally* 21 AM. JUR. 2D *Criminal Law* § 95 (1981). Strong policy reasons exist for not per-

mitting mentally incompetent individuals to stand trial. First, the adversary system requires that a defendant be capable of assisting counsel in the preparation of his defense. Additionally, a defendant must be capable of understanding the nature and object of the proceedings against him. *See Drope v. Missouri*, 420 U.S. 162, 171 (1974). In general, federal and state decisions involving defendants suffering from mental disorders have followed the *Pate* holding, although disagreement exists as to its application. *See generally* Annotation, *Competency to Stand Trial of Criminal Defendant Diagnosed as "Schizophrenic"—Modern State Cases*, 33 A.L.R. 4TH 1062 (1984); Annotation, *Competency to Stand Trial of Criminal Defendant Diagnosed as "Schizophrenic"—Modern Federal Cases*, 63 A.L.R. FED. 696 (1983). California statutory and case law have recognized the policy arguments behind not permitting mentally incompetent individuals to stand trial and judicial decisions are in accord with *Pate*. *See generally* 21 CAL. JUR. 3D (REV.) *Criminal Law* §§ 2886-2890 (1985 & Supp. 1988).

Section 1367 of the Penal Code provides that: "A person cannot be tried or adjudged to punishment while such person is mentally incompetent." CAL. PENAL CODE § 1367 (West 1982). Section 1368 of the Penal Code sets forth the procedure a trial court must follow when a question arises concerning the defendant's competency to stand trial. If both the court and the defense counsel express doubt as to the mental competence of the defendant, the court is required to suspend all proceedings and order a full competency hearing. *See* CAL. PENAL CODE § 1368 (West 1982). The court is also vested with the power to order a competency hearing *sua sponte*, even if defense counsel believes his client is competent. Finally, once a hearing has been ordered, all further criminal prosecution proceedings must be suspended until the present mental competence of the defendant has been determined. *Id.* at § 1368(c).

After *Pate*, the California Supreme Court has uniformly held that a competency hearing is required when substantial evidence indicates that the defendant is incompetent to stand trial. *See People v. Stankewitz*, 32 Cal. 3d 80, 92, 648 P.2d 578, 584, 184 Cal. Rptr. 611, 617 (1982); *People v. Pennington*, 66 Cal. 2d 508, 518, 426 P.2d 942, 949, 58 Cal. Rptr. 374, 381 (1967). In the present case, the trial court expressed specific doubts as to the defendant's competency based on his bizarre courtroom behavior. Further, all five psychiatrists agreed that the defendant suffered from a mental disorder but disagreed whether that disorder impaired the defendant's competency to understand the proceedings and take an effective role in his own defense. The court therefore concluded that substantial evidence existed to prove that the defendant was incompetent to stand trial and thus a section 1368 hearing was required.

The court next addressed the trial court's authority to vacate the order providing for a hearing, *sub silentio*. Section 1368 mandates that all criminal proceedings must be suspended until a determination has been made regarding the defendant's competency to stand trial. CAL. PENAL CODE § 1368(c) (West 1982). The state argued that the verdict should stand because when the trial resumed, the defendant was no longer mentally incompetent. The court was unpersuaded. Precedent has established that the trial court is not vested with discretion to unilaterally reject one set of psychiatric opinions in favor of a conflicting set to deny a hearing on competency. *Stankewitz*, 32 Cal. 3d at 93, 648 P.2d at 585, 184 Cal. Rptr. at 618. In this case, five separate psychiatric reports were entered; two clearly stated that the defendant was incompetent to stand trial. Therefore, the trial court improperly vacated the competency hearing order, *sub silentio*.

Next, the state argued that the defense counsel's failure to raise the competency issue at trial should be construed as a waiver of the defendant's right to a competency hearing. This argument is not persuasive in light of previous court decisions. Once sufficient doubt arises as to a defendant's mental competency, the matter is jurisdictional and cannot be waived. *See In re Davis*, 8 Cal. 3d 798, 808, 505 P.2d 1018, 1026, 106 Cal. Rptr. 178, 168, *cert. denied*, 414 U.S. 870 (1973); *People v. Westbrook*, 62 Cal. 2d 197, 203, 397 P.2d 545, 549, 41 Cal. Rptr. 809, 818 (1964). Therefore, not raising the competency issue at trial was inconsequential because the court had been divested of jurisdiction to proceed with the criminal prosecution.

The court's holding illustrates a strong desire to guarantee the defendant's right to a fair trial. Since the landmark *Pate* decision, the California court has held that defendants should not be permitted to stand trial unless they are fully capable of understanding the nature of the proceedings brought against them and are capable of assisting in their defense. Moreover, the court's interpretation of section 1368, that once a competency hearing is ordered the trial court cannot vacate the order, *sub silentio*, is sound. The existence of sufficient evidence questioning the defendant's ability to stand trial should place a duty on the court to conclusively determine whether the defendant is mentally competent before continuing criminal proceedings. The goal of our system of justice should be to ensure that all criminal de-

fendants are provided the opportunity of a fair trial. The court's decision is consistent with this goal.

RONALD P. SCHRAMM

VI. FAMILY LAW

In adoption cases, habeas corpus may not be used to collaterally attack final, non-modifiable judgments: **Adoption of Alexander S.**

In *Adoption of Alexander S.*, 44 Cal. 3d 857, 750 P.2d 778, 245 Cal. Rptr. 1 (1988), the California Supreme Court held that it was improper procedure for an appellate court to treat belated claims as if they constituted a writ of *habeas corpus* in adoption proceedings. The unanimous court, led by Justice Panelli, also emphasized the important policy of protecting the child's best interests in holding that the *habeas corpus* procedure may not be used as a collateral attack on final, non-modifiable judgments in adoption-related matters.

The natural mother, Nicoleta S., was four months pregnant when she immigrated to the United States from Romania in 1983. She was not married, and the child's natural father, Tudor G., remained abroad. Nicoleta, who is college-educated and has a good command of the English language, contacted the Catholic Foundation for Immigration and Resettlement regarding her decision to place her baby up for adoption. She was referred to an attorney and introduced to the prospective parents, Mark and Lorraine H. Both Nicoleta S. and Mr. & Mrs. H. consented to joint representation in writing pursuant to section 225m of the Civil Code. CAL. CIV. CODE § 255m (West 1982) [hereinafter section 225m]. Nicoleta agreed to allow them to adopt her child in exchange for medical and living expenses. Section 225m reads:

> Notwithstanding any other provision of law, it shall be unethical for an attorney to undertake the representation of both the prospective adopting parents and the natural parents of a child in any negotiations or proceedings in connection with adoption unless a written consent is obtained from both parties.

CAL. CIV. CODE § 225m (West 1982).

Mr. & Mrs. H. filed a petition for independent adoption in April 1984, just two days after Alexander was born. A social worker from the Department of Social Services met with Nicoleta several times to explain the adoption procedures, alternatives to adoption and the difficulty in withdrawing consent to adoption once it is given. Two months later, Nicoleta S. consented, but one month after that she notified the social worker of her decision to withdraw consent since she had obtained permanent employment. Upon notifying her attorney, he withdrew due to conflict of interest.

Nicoleta moved the trial court for visitation rights and filed peti-

tions to withdraw her consent to the adoption pursuant to section 226a of the Civil Code and to declare the existence of a father-child relationship. *See* CAL. CIV. CODE § 266a (West 1982) [hereinafter section 266a]. The five-day trial addressed the visitation and consent issues, postponing the father-child relationship issue to allow the father, Tudor G., an opportunity to come to this country and be heard.

The trial judge ruled that the consent withdrawal could be granted if the two requirements of section 226a were met: 1) withdrawal of consent must be reasonable in light of all circumstances, and 2) withdrawal of consent must be in the child's best interests. CAL. CIV. CODE § 226a (West 1982). The trial court found the first requirement was met. Although Nicoleta's consent was knowingly and voluntarily obtained, without the elements of coercion, duress or undue influence, she may have originally consented because of the stress of immigration and her inability to consult with the natural father. However, the court determined that withdrawal of consent was not in Alexander's best interest since Mr. and Mrs. H. could provide a more stable environment; the child had already "bonded" with his new parents and would suffer emotionally if separated from them. Therefore, the trial court denied the withdrawal of consent petition and the motion for visitation rights. The trial court's order was entered on January 3, 1985, with notice mailed to both parties on January 30, 1985. Although the judgment was appealable, no appeal was filed within the 60-day limitation period required by Rule 2(a) of the California Rules of Court.

Tudor G. could not leave Romania for the hearing and the court thereafter found he was not the "presumed" father and terminated his custody rights. Nicoleta S. filed a timely appeal from this judgment which did not mention the denial of her withdrawal of consent. Her brief, however, added a request for relief from this judgment to the judgment denying the Tudor G. paternal relationship.

Although the court of appeal "correctly recognized and frankly admitted" it had no jurisdiction to hear Nicoleta's claim on the consent issue, it *sua sponte* decided, without notice to the parties, to treat the belated appeal as a petition for *habeas corpus*. The only authority cited for what Justice Panelli termed the appellate court's "unorthodox decision" was 3 B. WITKIN, CALIFORNIA PROCEDURE, *Actions*, § 21c (3d ed. 1985) which states that "[*h*]*abeas corpus* is an appropriate remedy for obtaining custody of a child."

The appellate court found Nicoleta was denied effective assistance

of counsel (though she did not raise the issue) since her former attorney failed to provide her with the information that the social worker later did. The court of appeal then issued a writ of *habeas corpus*, ordering the trial court to vacate its judgment and initiate new proceedings.

The California Supreme Court noted several procedural errors made by the appellate court beginning with its lack of jurisdiction to even hear the claim regarding withdrawal of consent. Jurisdiction is vested in an appellate court upon *timely notice of appeal. See Estate of Hanley*, 23 Cal. 2d 120, 142 P.2d 423 (1943); 4 CAL. JUR. 3D *Appellate Review* § 155 (1973). Nicoleta never filed a notice appealing the judgment denying her petition to withdraw consent for adoption. She merely tacked the issue onto her brief for the father-child relationship issue. The supreme court also found error in that the court of appeal failed to afford the parties the chance to present views via supplemental briefing when it decided to render a decision based on issues not originally briefed pursuant to section 68081 of the Government Code. *See* CAL. GOV'T CODE § 68081 (West Supp. 1988). In fact, Mr. & Mrs. H. requested the opportunity to submit supplemental briefing once the appellate court suggested *habeas corpus* was applicable. Their request was denied.

Error also resulted from the substitution of *habeas corpus* for the available remedy of appeal. Absent special circumstances excusing the failure to appeal, a *habeas corpus* writ will not lie where errors could have been timely raised. *Alexander S.*, 44 Cal. 3d at 865, 750 P.2d at 783, 245 Cal. Rptr. at 5 (citing *In re Dixon*, 41 Cal. 2d 756, 759, 264 P.2d 513, 514 (1953)). The court of appeal also erred by failing to abide by proper *habeas corpus* procedures. For example, the court granted the writ without a verified petition and failed to afford opposing parties the opportunity to file a return to the petition.

Finally, the court distinguished *habeas corpus* in adoption cases where it could only result in "delay, uncertainty and potential harm to the prospective adoptee" from criminal cases where the defendant may have been unlawfully denied personal liberty. *Id.* at 866, 750 P.2d at 784, 245 Cal. Rptr. at 6.

The court then considered whether *habeas corpus* is ever appropriate to collaterally attack a final non-modifiable judgment in adoption cases and found it is not. The court listed six situations where *habeas corpus* is allowed in custody cases:

> "to enforce an existing right to physical custody established by prior order . . . to determine physical custody [. . .] where no previous custody order has issued . . . to modify a modifiable order . . . to protect a child from imminent danger . . . to allow a natural parent lacking physical custody to bring an original action . . . where consent to adoption was required but not obtained . . . to collaterally attack a prior order where the court lacked jurisdiction.

Id. at 866-67, 750 P.2d at 784, 245 Cal. Rptr. at 6 (citations omitted).

The court found that *habeas corpus* was not applicable to Alexander's case under any of the above situations, but clarified that its decision was not made solely on lack of precedent. The court did, however, express concern for the welfare of the child involved, finding that "protracted litigation" over child custody may produce harm. *Id.* at 868, 750 P.2d at 785, 245 Cal. Rptr. at 7. The court quoted a recent United States Supreme Court decision wherein federal *habeas corpus* could not be used to litigate child-custody related constitutional claims stating that "[t]he State's interest in finality is unusually strong in child-custody disputes. The grant of federal *habeas corpus* would prolong uncertainty for children. . . . It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents." *Id.* (citing *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 513-14 (1982)).

The court found the potential delay in Alexander's case additionally intolerable not only in light of the additional hearings necessary to finalize adoption, but also since Nicoleta S. failed to "avail herself of her right to appeal." *Id.* Hence, the unanimous opinion was clear; the best interest of the child should be foremost in these cases. Procedural error by either the parties or the appellate courts cannot and will not be excused.

LISA ELANE SLATER

VII. INSURANCE LAW

The California Insurance Guarantee Association (CIGA) is not subject to section 790.03 of the Insurance Code. CIGA is not liable under common law tort or bad faith, but is subject to the duty to defend and to accept a reasonable settlement offer: **Issaacson v. California Insurance Guarantee Association.**

I. INTRODUCTION

In *Issaacson v. California Insurance Guarantee Association*, 44 Cal. 3d 775, 750 P.2d 297, 244 Cal. Rptr. 655 (1988), the California Supreme Court held that the California Insurance Guarantee Association (CIGA) could not be held liable for violations of the Unfair Practices Act. *See* CAL. INS. CODE §§ 790-790.10 (West 1972 & Supp. 1988). Furthermore, the court held that CIGA was not subject to common law tort liability, nor liable for common law bad faith. However, the court did conclude that CIGA was under a duty to defend

insureds whose insurers had become insolvent and was also under a duty to accept a reasonable settlement offer within statutory limits under the Guarantee Act. *See* CAL. INS. CODE §§ 1063-1063.14 (West 1972 & Supp. 1988).

II. FACTUAL SUMMARY

A medical malpractice action was brought against the two physician-plaintiffs who were insured by Imperial Insurance Company. Imperial subsequently became insolvent and, pursuant to statute, CIGA assumed Imperial's duty to defend the insureds. The litigants settled the case for $500,000, but CIGA was unwilling to pay more than $400,000. At the mandatory settlement conference, the insureds agreed to pay the remaining $100,000. Subsequently, the insureds brought the present suit against CIGA for reimbursement of their $100,000 payment.

III. LIABILITY UNDER SECTION 790.03, TORT, AND COMMON LAW BAD FAITH

A. Section 790.03 Liability

The court first indicated that CIGA was not to be treated as an ordinary insurance company since it was not formed as such. Rather, CIGA was created to assure that insureds would have their claims paid up to the statutorily delineated amount in the event their insurer became insolvent. The legislature expressly limited payment by CIGA to those claims covered by the insureds' insolvent carrier up to a maximum of $500,000 per covered claim. CIGA was not authorized to make payment outside the scope of covered claims.

The court noted that CIGA was not to be considered a profit making enterprise by the court. Thus, watchdog-type procedures such as section 790.03 of the Insurance Code and common law tort liability were inappropriate. CIGA does not receive a financial benefit from refusing not to defend or settle claims since it only collects funds from California insurance companies based on its financial obligations.

Since CIGA was not an insurance company, the court concluded that the Unfair Practices Act, particularly section 790.03, was inapplicable. The legislature had specifically authorized CIGA to pay only for covered claims, thus it was unnecessary to apply the Act to CIGA's unique position. *See* CAL. INS. CODE §§ 790-790.10 (West 1972 & Supp 1988). *See generally* 2 P. EISLER, CALIFORNIA UNINSURED MOTORIST LAW §§ 27.10-27.11 (4th ed. 1987) (application of Unfair Practices Act to uninsured motorists); 1 CALIFORNIA INSURANCE LAW & PRACTICE ch. 7 (1986) (overview of duty of good faith and fair deal-

ing); 39 CAL. JUR. 3D *Insurance Contracts and Coverage* §§ 410-412 (1977 & Supp 1988).

B. Tort Liability

The court held that because of the statutory mandate to pay out only "covered claims" and the legislative intent to restrict CIGA to "covered claims," CIGA was not liable for any tort damage in excess of the covered claims.

C. Common Law Bad Faith

The court also held that under a common law bad faith action, CIGA was not liable for breach of the implied covenant of good faith and fair dealing because there was no contractual relationship between CIGA and the plaintiffs.

IV. LIABILITY FOR REIMBURSEMENT WITHIN STATUTORILY AUTHORIZED LIMITS

A. Duty to Defend

Section 1063.1 of the Insurance Code provides that CIGA has a duty to defend if it falls within "covered claims." *See* CAL. INS. CODE § 1063.2(a) (West Supp. 1988). If the underlying insolvent insurer has a duty to defend, CIGA assumes that duty since the scope of "covered claims" is defined by the duty of the underlying insurance carrier. *See* 1 CALIFORNIA INSURANCE LAW AND PRACTICE ch. 12 (1986).

B. Duty to Accept a Reasonable Settlement Offer

In order to recover an excess amount, the insured must first prove that CIGA refused to settle the claim for a reasonable amount. If, after proof, it becomes clear that CIGA failed to accept a reasonable settlement offer within its statutory limits, it becomes liable for the excess amount paid by the insureds up to the policy limits. *See* 1 P. EISLER, CALIFORNIA UNINSURED MOTORIST LAW § 8.70 (4th ed. 1986) (application of Guarantee Act to uninsured motorists); 1 CALIFORNIA INSURANCE LAW & PRACTICE ch. 12 (1986); 39 CAL. JUR. 3D *Insurance Companies* §§ 166, 169 (1977 & Supp. 1988). The court qualified its holding by stating that no presumption exists providing that the total amount paid to a plaintiff in a tort action constitutes a reasonable settlement in a situation where CIGA paid less than the statutory maximum and the alleged tortfeasors paid the rest.

V. CONCLUSION

The legislature has expressly authorized that CIGA pay only "covered claims," and thus a good reason exists for eliminating any liability for excess payments. It takes only a small inferential leap to conclude that any allegations of unfair practices under sections 790-790.10 will not apply to CIGA because of the statutory limit. However, CIGA is still liable under a statutory duty for payment of "covered claims," and CIGA still has an affirmative duty to defend and to accept reasonable settlement offers within the statutory limits. Thus, CIGA is not completely immune from litigation.

ERNEST F. BATENGA

VIII. LABOR LAW

A. *Parity agreements in employment contracts between employees and school districts are not per se illegal, but will be analyzed on a case-by-case basis:* Banning Teachers Association v. Public Employment Relations Board.

I. INTRODUCTION

The California Supreme Court, in *Banning Teachers Association v. Public Employment Relations Board*, 44 Cal. 3d 799, 750 P.2d 313, 244 Cal. Rptr. 671 (1988), refused to hold that parity agreements between a school district and its employees are *per se* violations of sections 3543.5 and 3545 of the Government Code. *See* CAL. GOV'T CODE §§ 3543.5, 3545 (West 1980 & Supp. 1988) [hereinafter sections 3543.5 and 3545]. The court did state, however, that a parity agreement could be found to violate those provisions, but the decision of the Public Employment Relations Board as to the existence of a violation would be given due deference.

II. FACTUAL SUMMARY

The Banning Unified School District [hereinafter the District] entered into negotiations with its classified employees unit and consented to a parity agreement. The parity agreement would match any subsequent increase in salaries of other units. A few months later the District entered into negotiations with District's certificated employees unit through the unit's representative California Teachers Association/National Education Association [hereinafter CTANEA]. The certified employees and salaries were raised above the classified employees' salaries pursuant to the parity agreement. CTANEA filed an unfair practice charge with the Public Employment Relations Board [hereinafter PERB]. PERB has statutory power to investigate charges alleging violations of sections 3543.5 and 3545. *See*

generally 56 CAL. JUR. 3D *Schools* § 366 (1980 & Supp. 1988) (overview of PERB). The administrative law judge found no violation under the cited statutes and concluded that the District had not violated its duty to bargain in good faith. PERB filed an opinion agreeing with the administrative law judge and reasoned that the legality of parity agreements should be litigated on a case by case basis. The appellate court reversed, holding that parity agreements were *per se* illegal.

A. Separation of Agencies Pursuant to Section 3545 of the Government Code

Justice Panelli stated that PERB was statutorily granted the power to investigate and resolve unfair practice charges. *Banning*, 44 Cal. 3d at 804, 750 P.2d at 315, 244 Cal. Rptr. at 673. The court indicated that the appellate court failed to give due deference to the decision by PERB and had substituted its own decision.

The court further stated that each unit negotiates on its own behalf for its own benefits pursuant to Government Code section 3545, subsection b(3). *See* CAL. GOV'T CODE § 3545(b)(3) (West Supp. 1988). *See generally* Blumberg, Brannigan & Nason, *Administrative Power and Collective Bargaining in the Schools*, 10 J. OF COLLECTIVE NEGOTIATION IN PUB. SECTOR 327 (1981) (general discussion on collective bargaining in the school setting). Since the requirement was followed, any benefit to the classified employees pursuant to the parity agreement was not the mixing of units against which section 3545 was mandated.

B. Bargaining in Good Faith by the District Pursuant to Section 3543.5

The court held that in this instance the parity agreement did not violate the District's duty to bargain in good faith pursuant to section 3543.5. The court reasoned that the District was operating under a finite budget constraint and would take into consideration its bargaining results with other units regardless of the existence of the parity agreement. The court gave deference to PERB's finding that the existence of the parity agreement, in this case, did not have a significant impact on the bargaining power of teachers. *See generally* Note, *The Negotiability of Parity Agreements in Public Sector Collective Bargaining*, 11 FORDHAM URB. L.J. 139 (1982) (impact of parity agreements in New York).

III. CONCLUSION

The court held that parity agreements are not *per se* illegal, but the legality of such agreements must be determined on a case by case basis. Thus, negotiations would still be subject to scrutiny, although substantial deference would be given to the findings of PERB. The court, in this case, examined a split in case law among the various state and federal jurisdictions and resolved to follow a course which would give the deference to PERB that earlier California case law had mandated. The court dismissed the argument that parity agreements would inhibit a non-parity unit since school districts must now consider that individual pay increases may automatically increase pay for the parity unit. When combined with finite budgetary restrictions, this may cause an enormous disincentive to raise pay, which will ultimately decrease the non-parity unit's bargaining power. Due to the statutory mandate, the court allowed the three-member Public Employment Relations Board to become the major factor in determining whether or not the disincentive affected the duty to bargain in good faith.

ERNEST F. BATENGA

IX. REAL PROPERTY LAW

A. *The United States is similar to a private landowner and is not precluded by the federal Constitution from acquiring riparian rights. Prior to exercising its riparian rights, the United States must apply to the Water Resources Control Board to determine the propriety of the intended use:* In re Water of Hallett Creek Stream System.

I. INTRODUCTION

In *In re Water of Hallett Creek Stream System*,[1] the issue before the supreme court was whether, pursuant to California law, the United States had riparian water rights on land reserved by the federal government as a national forest. The court found that the United States was in a position equivalent to that of a private California landowner and that the federal government was not forbidden by the United States Constitution from acquiring riparian rights under the laws of California. The court based this finding on the principle that the federal government may act in a proprietary capacity with

1. 44 Cal. 3d 448, 749 P.2d 324, 243 Cal. Rptr. 887 (1988). Justice Kaufman wrote the unanimous opinion of the court. For a discussion of the law prior to this decision, see Comment, *The Application of California Riparian Water Rights Doctrine to Federal Lands in the Mono Lake Basin*, 34 HASTINGS L.J. 1293 (1983).

respect to reserved lands, but that Congress will defer to state law in ascertaining the riparian rights attached to those lands. In addition, the court found that these riparian rights were not *per se* defeasible[2] and that the United States must apply to the Water Resources Control Board (the Board), prior to the exercise of these rights, for a determination as to the propriety of the intended use. The court believed that such a finding was consistent both with the powers given to the Board by the state and with the treatment given to a private party asserting a riparian right.

II. STATEMENT OF FACTS

In August 1976, the Board[3] was petitioned by a private party to determine the rights of several claimants as to the waters of Lassen County's Hallett Creek Stream System. With a need for water in the Plumas National Forest, the United States asserted rights of two types: "(1) a 'reserved' water right under federal law for 'primary' national forest purposes[4] . . . and (2) riparian[5] water rights under California law for 'secondary' national forest purposes."[6] The Board granted the claim of reserved rights, but denied the United States ri-

2. For an explanation of defeasibility, see *infra* notes 33-39 and accompanying text.

3. The State Water Resources Control Board [hereinafter the Board] is the administrative body charged with the primary determination of water rights in California. *See* CAL. WATER CODE § 2501 (West 1971). For further explanation of the Board's procedure, see *Hallett Creek*, 44 Cal. 3d at 454 n.1, 749 P.2d at 325 n.1, 243 Cal. Rptr. at 888-89 n.1. *See generally* 62 CAL. JUR. 3D *Water* §§ 496-500 (1981) (function and procedure of the Board).

4. Under the reserved rights doctrine, land reserved for a federal purpose impliedly reserved sufficient water to carry out the primary purpose of the reservation. Therefore, where the federal government seeks water rights for a "secondary purpose," it may not use the federal reserved rights doctrine; rather, it must look to the appropriate state law. *Hallett Creek*, 44 Cal. 3d at 457-58, 749 P.2d at 327-28, 243 Cal. Rptr. at 891 (citing United States v. New Mexico, 438 U.S. 696, 698, 711-15 (1978); Cappaert v. United States, 426 U.S. 128, 138-42 (1976)); *see also infra* note 8 and accompanying text.

5. Two types of water rights are recognized under California law. Riparian rights give the proprietor the right to make "reasonable and beneficial uses of the water on that land." Appropriative rights give a person "who diverts or appropriates water from a watercourse and puts it to a reasonable and beneficial use . . . a right to that use which is superior to the rights of later appropriators." *Hallett Creek*, 44 Cal. 3d at 454-55 n.2, 749 P.2d at 325 n.2, 243 Cal. Rptr. at 889 n.2; *see also* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 768-777 (1987); 78 AM. JUR. 2D *Waters* §§ 260, 316 (1975); 62 CAL. JUR. 3D *Water* §§ 65-183, 255-385 (1981).

6. *Hallett Creek*, 44 Cal. 3d at 454-55, 749 P.2d at 325, 243 Cal. Rptr. at 889. The United States described their primary use as "firefighting and roadwatering." The secondary use was described as "wildlife enhancement." *Id.*

parian rights for its secondary purpose on the grounds that California law did not authorize the granting of riparian rights to the federal government and that Congress had dissolved the government's ability to assert such a claim.[7]

Pursuant to section 2757 of the California Water Code, the United States sought a new determination of its riparian rights in the superior court.[8] Upholding the United States' exception to the Board's determination, the superior court stressed that under California law, the federal government is no less able to assert its riparian rights than other California landowners.[9] The trial court also found that although Congress had indeed made federal riparian rights defeasible to appropriative rights on public lands, Congress had not made such a rule applicable to lands reserved for national forest purposes.[10] The court of appeal subsequently affirmed the superior court's holding as to the existence of riparian rights, but reversed the trial court's finding on defeasibility, holding that federal legislation requires that federal riparian rights are "automatically subordinate to the rights of subsequent appropriators."[11] Both parties petitioned the supreme court for review.

III. THE COURT'S OPINION

A. *It is Constitutionally Permissible for the United States to Assert Riparian Rights under California Law.*

The Board first argued that the federal government was incapable of exercising rights in a proprietary capacity under state law since the exercise of such rights was beyond the scope of the sovereign powers delegated in the federal Constitution.[12] In rejecting this argument, the court first noted the differences between a private and governmental landowner.[13] Looking to United States Supreme Court cases which discussed federal water rights, the court found that although these rights had been discussed in terms of the sovereign rights delegated by the commerce[14] and supremacy[15] clauses of the

7. *Id.* at 455, 749 P.2d at 326, 243 Cal. Rptr. at 889. The pertinent federal legislation includes the Mining Act of 1866, 43 U.S.C. § 661 (1976), the Patents Act of 1870, 43 U.S.C. § 661 (1976), and the Desert Land Act of 1877, 43 U.S.C. §§ 321-23 (1976).

8. *Hallett Creek*, 44 Cal. 3d at 445, 749 P.2d at 326, 243 Cal. Rptr. at 889. The riparian rights issue was the only ground for appeal. The reserved rights issue was considered settled at the Board level and is not germane to the remainder of the discussion.

9. *Id.* at 455, 749 P.2d at 326, 243 Cal. Rptr. at 890.

10. *Id.* at 456, 749 P.2d at 326, 243 Cal. Rptr. at 890.

11. *Id.*

12. *Id.* at 459, 749 P.2d at 328, 243 Cal. Rptr. at 892.

13. *Id. See generally* Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638, 649-53 (1957) (discussion of government ownership of land).

14. U.S. CONST. art. IV, § 3, cl. 2.

15. *Id.*

Constitution, no decision has precluded the United States from exercising its state-provided proprietary rights along with its sovereign powers.[16] Based on the holdings in *Camfield v. United States*[17] and *Kleppe v. New Mexico*,[18] the court held that the federal government was free to act in a proprietary capacity with respect to its own land.[19]

Having established the ability of the United States to act in a proprietary capacity, the court next considered whether the exercise of such rights was proper under California law. Based on the landmark water rights case of *United States v. New Mexico*,[20] the court found that "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."[21] Applying the *United States v. New Mexico* holding in a manner it believed to be consistent with congressional intent, the court extended the requirement of deferring to state law to include decisions determining water rights for secondary uses on federally reserved lands. Thus, as California law provides for the acquisition of riparian rights by any proprietor,[22] the court established that the United States was not constitutionally prohibited from asserting its riparian rights under the laws of the state.

B. Congress did not Sever Federal Proprietary Claims to Riparian Rights in California.

The Board next alleged that Congress's passing of the Mining Acts of 1866,[23] the Patents Act of 1870,[24] and the Desert Land Act of 1877[25] served to sever federal proprietary claims to riparian rights in California. Disagreeing with the Board, the court discussed the history of water rights in California[26] and concluded that these Acts

16. *Hallett Creek*, 44 Cal. 3d at 460, 749 P.2d at 329, 243 Cal. Rptr. at 892.
17. 167 U.S. 518, 524 (1897).
18. 426 U.S. 529, 540 (1976).
19. *Hallet Creek*, 44 Cal. 3d at 460, 749 P.2d at 329, 243 Cal. Rptr. at 892-93.
20. 438 U.S. 696 (1978).
21. *Hallett Creek*, 44 Cal. 3d at 460, 749 P.2d at 329, 243 Cal. Rptr. at 893 (quoting United States v. New Mexico, 438 U.S. at 702).
22. *See supra* note 5 and accompanying text.
23. 43 U.S.C. § 661 (1975).
24. 43 U.S.C. § 661 (1976); *see* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 772 (1987).
25. 43 U.S.C. §§ 321-23 (1976); *see Hallett Creek*, 44 Cal. 3d at 462-66, 749 P.2d at 330-33, 243 Cal. Rptr. at 894-97.
26. *Id.* at 463-64, 749 P.2d at 332, 243 Cal. Rptr. at 895. *See generally* Note, *Instream Appropriations and the Dormant Commerce Clause: Conserving Water for the Future*, 75 GEO. L.J. 1701 (1987) (water rights in western states); Note, *Federal-State*

both established the "appropriation doctrine" and applied it to "the waters of the West."[27] The court noted that the present dispute was sparked by the development of competing theories as to federal riparian rights under state law. Under the California doctrine, as propounded by the United States, state law governed the rights applicable to the United States in association with its property in the state; therefore, the riparian rights adopted by California in *Lux v. Haggin*[28] were to apply.[29] Under the Oregon rule, the theory propounded by the Board, the Desert Land Act was viewed as establishing appropriative rights as the " 'uniform rule' " in the western states, thus resulting in a severance of the federal government's water rights from the land upon conveyance.[30]

This dispute was settled by the United States Supreme Court in *California-Oregon Power v. Beaver Portland Cement Co.*[31] Attempting to find a middle ground, the Court approved the Oregon doctrine[32] but failed to find that appropriation was the "uniform rule." Rather, the Court deferred to the various western states on the question of whether common law riparian rights or appropriative rights should apply.[33] Based on this history, the *Hallett Creek* court was left with no precedent pertaining to the water rights which attached to land retained by the United States. With no case law impairing the *Lux* decision that riparian rights are applicable to California landowners regardless of the owners identity, the court concluded that no severance had occurred and that riparian rights attached to federal property within the state.[34]

C. *Riparian Rights on Federally Reserved Lands are not Defeasible.*

The Board next contended, as the court of appeal so held, that the Desert Land Act automatically subordinates riparian rights on fed-

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Conflicts over the Control of Western Waters, 60 COLUM. L. REV. 967, 971 (1960) [hereinafter *Federal-State Conflicts*] (discussion of the conflict between riparian and appropriative rights and state and federal assertions of those rights).

27. 69 Cal. 255, 10 P. 674 (1886).

28. *Hallett Creek*, 44 Cal. 3d at 464, 749 P.2d at 332, 243 Cal. Rptr. at 895-96; *see also Federal-State Conflicts*, *supra* note 26, at 972-73. *See generally* 62 CAL. JUR. 3D *Water* §§ 66-67 (1981) (federal and state owners of riparian rights and *Lux* discussion).

29. *Hallett Creek*, 44 Cal. 3d at 465, 749 P.2d at 332-33, 243 Cal. Rptr. at 897; *see also* Hough v. Porter, 51 Or. 382, 98 P. 1083 (1909). *See generally* 78 AM. JUR. 2D *Waters* § 278 (1975) (severance of rights from land); 62 CAL. JUR. 3D *Water* §§ 114-116 (1981) (severance of rights from land).

30. 295 U.S. 142 (1935) (patent issued for lands in a desert territory does not include the right to water flowing across or bordering upon the land).

31. *Id.* at 164.

32. *Id.*

33. *Hallett Creek*, 44 Cal. 3d at 467, 749 P.2d at 334, 243 Cal. Rptr. at 898.

34. *Id.* at 467-68, 749 P.2d at 334, 243 Cal. Rptr. at 898. *See generally* 62 CAL. JUR. 3D *Water* §§ 66-67 (1981) (rights of prior riparian or appropriative owners).

eral lands to "subsequent appropriators recognized under state and local law."[35] Based on *Federal Power Commission v. Oregon*,[36] the court rejected this contention, emphasizing that the Desert Land Act subordinates riparian rights only on federal lands which are within the "public domain"[37] and not on lands "reserved" for a federal purpose.[38] Dismissing the appellate court's contention that *United States v. New Mexico*[39] overruled *Federal Power Commission*, the court found that "nothing in that decision limits the United States to the acquisition of appropriative rights where riparian rights are otherwise recognized under state law."[40] The court concluded that California does not provide for the principle of a "federally held 'defeasible riparian right.' "[41]

D. Federal Riparian Rights may be Limited.

Finally, the court answered the Board's contention that the rights of appropriators would be violated upon implementation of an "unexercised" federal riparian right.[42] Based on *In re Waters of Long Valley Creek Stream System*,[43] the court held that no such violation of rights would occur because the Board is empowered to subordinate the federal riparian rights to "appropriative 'rights currently being exercised,' and may further 'determine that the future riparian right [of the federal government] shall have a lower priority than any uses of water it authorizes before the riparian in fact attempts to exercise his right.' "[44] As a result of this power, the court concluded that prior to the exercise of its riparian rights, the United States must ap-

35. 349 U.S. 435, 447-48 (1955).

36. *Hallett Creek*, 44 Cal. 3d at 469, 749 P.2d at 335-36, 243 Cal. Rptr. at 899. Lands of "public domain" are "lands open to settlement, sale or disposition under the federal public land laws. . . . 'Reserved' lands are lands which have been removed from the public domain for some predetermined purpose, such as a national park [or] national forest." *Id.* at 456 n.5, 749 P.2d at 326-27 n.5, 243 Cal. Rptr. at 890 n.5.

37. *Id.* at 469, 749 P.2d at 335-36, 243 Cal. Rptr. at 899 (citing Cappaert v. United States, 426 U.S. 128, 138 (1976)).

38. 348 U.S. 696 (1978); *see also* text accompanying notes 19-21.

39. *Hallett Creek*, 44 Cal. 3d at 470, 749 P.2d at 336, 243 Cal. Rptr. at 899-900.

40. *Id.* at 470, 749 P.2d at 336, 243 Cal. Rptr. at 900.

41. *Id.*

42. 25 Cal. 3d 339, 599 P.2d 656, 158 Cal. Rptr. 350 (1979) [hereinafter *Long Valley*].

43. *Hallett Creek*, 44 Cal. 3d at 471, 749 P.2d at 337, 243 Cal. Rptr. at 900 (quoting *Long Valley*, 25 Cal. 3d at 359, 599 P.2d at 668-69, 678, 158 Cal. Rptr. at 362. *See generally* Note, *Unused Riparian Water Rights In Washington—Department of Ecology v. Abbot, 103 Wash. 2d 686, 694 P.2d 1071 (1985)*, 60 WASH. L. REV. 787 (1985) (loss of unexercised water rights).

44. *Hallett Creek*, 44 Cal. 3d at 472, 749 P.2d at 337, 243 Cal. Rptr. at 901.

ply to the Water Resources Control Board for a determination as to the propriety of the intended use.[45] This determination will be made "in light of the state's interest in promoting the most efficient and beneficial use of the state's waters."[46]

IV. CONCLUSION

Hallett Creek presents a question of first impression in California and raises vital issues in a time when western states are suffering a severe water shortage. The United States has not previously attempted to claim riparian rights on its reserved lands in California. In light of the percentage of California land owned by the federal government, the significance of the decision only increases. The court has succeeded in finding a middle ground where both the federal and state interests are efficiently and equitably served. By requiring the United States to apply to the Water Resources Control Board prior to exercising its riparian rights, the court has assured that the rights of prior appropriators will be protected. Similarly, by allowing the federal government to be treated in a fashion equivalent to other California proprietors, the court has assured the United States of an equal opportunity to protect its national forests.

STEVEN L. MILLER

B. *San Francisco's Transit Impact Development Fee does not violate developers' vested rights despite retroactive application:* **Russ Building Partnership v. City and County of San Franscisco.**

In *Russ Building Partnership v. City and County of San Franscisco*, 44 Cal. 3d 839, 750 P.2d 324, 244 Cal. Rptr. 682 (1988), the court upheld the retroactive application of a San Franscisco Transit Impact Development Fee (TIDF) ordinance. The plaintiffs' building permits were conditioned upon participation in a "downtown assessment district or similar fair and appropriate mechanism." Thus, the TIDF embraced the condition's scope. The court found that the TIDF assessment did not violate the plaintiffs' vested rights because the building permits were subject to the conditions expressed in the permits.

In 1979, both Crocker National Bank (Crocker) and Pacific Gateway Associates Joint Venture (Pacific) applied for building permits to erect office towers in downtown San Francisco. Alarmed by the probable increase in both noise and congestion, and also cognizant of an environmental impact report indicating a negative impact on the

45. *Id.*
46. *Id.*

San Francisco Municipal Railway, the permits were approved subject to both Crocker's and Pacific's participation in a downtown assessment district. This downtown assessment district or "similiar fair and appropriate mechanism," would raise capital to maintain and improve San Francisco's transportation services. Crocker and Pacific accepted the conditional permits. All other permits approved for office development in downtown San Francisco also imposed the same condition.

In 1981, while Pacific and Crocker were constructing their buildings, the San Francisco Board of Supervisors instituted the TIDF ordinance. The restriction required all developers of new downtown San Francisco office space to pay the TIDF as a prerequisite to receiving a certificate of completion and occupancy. The defendant contended that the purpose of the TIDF was to offset the increasing costs that the new office developments would have on San Francisco's public transportation system.

Property developers acquire a vested right to finish construction of a project once they accomplish substantial work, incur considerable liabilities, and rely in good faith on a building permit issued by a government agency. *See Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 791, 553 P.2d 546, 550, 132 Cal. Rptr. 386, 389-90 (1976) (citing *Trans-Oceanic Oil Corp. v. Santa Barbara*, 85 Cal. App. 2d 776, 784, 194 P.2d 148, 152 (1948) (quoting 9 AM. JUR. *Buildings* § 8 (1937)). Once a vested right is acquired, a subsequent change in zoning rules will not upset such a right to build as authorized by the building permit. *Avco*, 17 Cal. 3d at 791, 553 P.2d at 550, 132 Cal. Rptr. at 390 (1976). Vested rights not only encompass protection of construction rights, but also the right to use the subject property as contemplated by the building permit. *San Diego v. McClurken*, 37 Cal. 2d 683, 691, 234 P.2d 972, 977 (1951) (citing *Coldwater v. Williams Oil Co.*, 288 Mich. 140, 142-43, 284 N.W. 675, 676 (1939)); *Best & Co. v. Incorporated Village of Gorden City*, 286 N.Y.S. 980, 981, 247 A.D. 893 (1936)); *see* 13 AM. JUR. 2D *Buildings* § 10 (1964 & Supp. 1988); 11 CAL. JUR. 3D *Building Regulations* § 1 (1974 & Supp. 1988).

A special assessment district is a fee mechanism that is imposed upon property which will benefit from a public improvement. *Dawson v. Town of Los Altos Hills*, 16 Cal. 3d 676, 683, 547 P.2d 1377, 1381, 129 Cal. Rptr. 97, 101 (1976) (quoting CAL. STS. & HIGH. CODE § 10008 (West 1969)); *Solvang Mun. Improvement Dist. v. Board of Supervisors*, 112 Cal. App. 3d 545, 552, 169 Cal. Rptr. 391, 395 (1980). The special assessment district, created by a local government resolution, is

subject to public scrutiny and rejection unless overridden by an eighty percent majority of the local legislative body. *Dawson*, 16 Cal. 3d at 683 n.4, 547 P.2d at 1381 n.4, 129 Cal. Rptr. at 101 n.4.

Plaintiffs Crocker and Pacific attacked the TIDF ordinance on three grounds. First, it was argued that the intention of the TIDF was to apply to both prior and present downtown office buildings. Second, the TIDF was not a downtown assessment district because it only subjected new office developments to the fee mechanism. And third, the TIDF violated the plaintiffs' vested rights to develop office towers because their building permits did not effectively notify them of the TIDF. Thus, such a retroactive application, it was argued, violated their constitutional due process rights. The court summarily rejected all three arguments.

First, the court reasoned that the express language of the building permits called for the TIDFs to be applied to new office developments. The wording "cumulative office development," according to the court, signified that the TIDFs were to furnish additional capital to San Francisco. This additional capital would be used to pay for the additional cost in maintenance and improvements required since new office developments would cause additional burdens on San Francisco's public transportation system.

Second, the TIDF, according to the court, was comparable to a special assessment district since it applied to a specific geographic area which would benefit from better transportation services. Additionally, the TIDF raised funds that would pay for the increased demands created by the plaintiffs' projects. Therefore, the TIDF was analogous to a downtown assessment district or "similar fair and appropriate mechanism."

Third, the TIDF did not violate the plaintiffs' vested rights because the plaintiffs' building permits expressly conditioned their construction rights. The court opined that even if the condition was ambiguous in its application, the plaintiffs were not exempt from the operation of the conditional building permits. Thus, the plaintiffs were adequately notified because the TIDF was a reasonable adaptation of the expressed condition of the plaintiffs' building permits.

This case sanctions the use of ambiguous conditional building permits. Consequently, developers will be heavily impacted as municipalities will retroactively control land use without violating a developer's vested rights—so long as the retroactively imposed condition is an appropriate application of the pre-existing building permit.

PETER BENNETT LANGBORD

X. TORTS

Strict liability will not be imposed on manufacturers of prescription drugs if the drug is properly prepared and contains appropriate warnings at the time of distribution. The market share doctrine does not support causes of action for fraud, breach of warranty, or joint liability of defendant manufacturers: **Brown v. Superior Court.**

I. INTRODUCTION

In *Brown v. Superior Court*,[1] the California Supreme Court resolved several issues involving the scope of liability for prescription drug manufacturers. The court held that the manufacturers were not strictly liable in tort for injuries caused by prescription drugs, absent proof that the drug was improperly prepared or that the manufacturer failed to warn of dangerous side effects which were known or reasonably should have been known when the drug was distributed.[2] The court also clarified the market share doctrine enunciated in *Sindell v. Abbott Laboratories*[3] by stating that defendant manufacturers were not jointly and severally liable for the entire amount of damages. Rather, they are liable only for the proportion of the damages which equaled their respective percentage or share of the market.[4] Furthermore, causes of action for fraud and breach of warranty could not be maintained based on the "market share" theory of liability.[5]

II. FACTUAL BACKGROUND

The plaintiffs, in sixty-nine different cases,[6] brought suit against 170 or more manufacturers of the drug diethylstilbestrol (DES) for injuries sustained *in utero* after their mothers had used the drug dur-

1. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988). Justice Mosk wrote the unanimous opinion for the court.

2. *Id.* at 1069, 751 P.2d at 482-83, 245 Cal. Rptr. at 425. *See infra* notes 13-40 and accompanying text.

3. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

4. *Brown*, 44 Cal. 3d at 1072-75, 751 P.2d at 485-87, 245 Cal. Rptr. at 426-28. *See infra* notes 41-47 and accompanying text.

5. *Brown*, 44 Cal. 3d at 1072, 751 P.2d at 484, 245 Cal. Rptr. at 426.

6. *Id.* at 1055, 751 P.2d at 473, 245 Cal. Rptr. at 414. Although each case is independent of the others, the court's ruling is binding on all of the actions as well as subsequently filed cases presenting the same issues. *Id.*

ing pregnancy to prevent miscarriage.[7] The plaintiffs alleged that the defendant manufacturers knew DES contained a cancer-causing substance, but failed to warn the prospective users or their physicians of these inherent dangers.[8] The plaintiffs sought to hold the defendant manufacturers liable based upon strict liability, negligence, fraud, and breach of both express and implied warranties.[9]

The trial court, in pre-trial rulings, held that the defendants were liable for injuries caused by DES only if they failed to warn of known defects or side effects.[10] Further, the lower court dismissed the breach of warranty and fraud causes of action maintained under the market share theory of liability, stating that each defendant manufacturer was liable only for the damages which are equal to its proportion of the market.[11] These rulings were upheld by the appellate court.[12]

III. SCOPE OF LIABILITY FOR MANUFACTURERS OF PRESCRIPTION DRUGS

The court first examined the issue of whether strict liability should be imposed on manufacturers of prescription drugs.[13] Strict liability, unlike negligence where liability is predicated on the failure of the manufacturer to exercise due care, imposes liability on the manufacturer merely upon proof that a defect in the product caused the alleged injury.[14] The focus is "not on the conduct of the manufacturer but on the product itself, and [strict liability] holds the manufacturer liable if the product was defective."[15]

Barker v. Lull Engineering Co.[16] identified three different types of situations where a manufacturer could be held strictly liable. First, strict liability may be imposed when a product is improperly manufactured and causes injury which would not have occurred had the product been properly manufactured.[17] Second, strict liability may

7. *Id.* at 1054-55, 751 P.2d at 473, 245 Cal. Rptr. at 414. A more detailed discussion of the problems associated with DES and the injuries which resulted from its use is presented in Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 593-95, 607 P.2d 924, 925-26, 163 Cal. Rptr. 132, 133-34, *cert. denied*, 449 U.S. 912 (1980).

8. *Brown*, 44 Cal. 3d at 1055, 751 P.2d at 473, 245 Cal. Rptr. at 414.

9. *Id.*

10. *Id.* at 1055, 751 P.2d at 473, 245 Cal. Rptr. at 414-15.

11. *Id.* at 1055, 751 P.2d at 473, 245 Cal. Rptr. at 415.

12. *See* Brown v. Superior Court, 192 Cal. App. 3d 150, 227 Cal. Rptr. 168 (1986).

13. *Brown*, 44 Cal. 3d at 1059, 751 P.2d at 473-74, 245 Cal. Rptr. at 415. Only one case had held that strict liability should be imposed on a manufacturer of prescription drugs. *See* Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652, 654-57 (1st Cir. 1981).

14. *Brown*, 44 Cal. 3d at 1056, 751 P.2d at 474, 245 Cal. Rptr. at 415. Strict liability was adopted by the California Supreme Court in 1963. *See* Greenman v. Yuba Power Prod., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

15. *Brown*, 44 Cal. 3d at 1056, 751 P.2d at 474, 245 Cal. Rptr. at 415.

16. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

17. *Id.* at 428-29, 573 P.2d at 453-54, 143 Cal. Rptr. at 235-36; *see* Escola v. Coca-Cola

arise when the product is defectively designed.[18] Finally, strict liability can be applied against manufacturers for failure to warn of a product's dangerous propensities.[19] The *Brown* court examined only the second and third types of strict liability since the plaintiff did not allege the existence of a manufacturing defect.

Two tests were enunciated in *Barker* to prove that a product was designed defectively.[20] The first test involves an examination into whether "the product failed to perform as safely as the ordinary consumer would expect when used in an intended and reasonably foreseeable manner."[21] The *Brown* court stated that the "consumer expectation standard" is inapplicable when the product is a prescription drug.[22] A patient's expectation as to the effectiveness and risks associated with the use of prescription drugs are based on the information which the physician has conveyed to him.[23] The warnings regarding a particular drug are directed to the physician who has the duty to inform the patient as to the side effects of the particular drug.[24] Thus, the court reasoned that since a physician understands that the use of prescription drugs often involves uncertain results and risks, a manufacturer is not liable under the "consumer expectation" test as long as adequate warnings are provided to the physician.[25]

The second test stated in *Barker* involves balancing the gravity and likelihood of the risks inherent in the product as designed against the benefits the product could produce to the public.[26] The *Brown* court argued that strict liability should not be imposed on manufacturers of prescription drugs, such as DES, which contain unknown inherent dangers because the benefits of having such drugs available to the public outweigh the risks involved in their use.[27] "Public policy favors the development and marketing of beneficial new drugs, even

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Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Coca-Cola bottle exploded in plaintiff's hand).

18. *Id.* at 429, 573 P.2d at 453, 143 Cal. Rptr. at 235. *See infra* notes 31-32 and accompanying text.

19. *Barker*, 20 Cal. 2d at 428, 573 P.2d at 453, 143 Cal. Rptr. at 235. *See infra* notes 31-32 and accompanying text.

20. *Barker*, 20 Cal. 2d at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38.

21. *Id.*

22. *Brown*, 44 Cal. 3d at 1061, 751 P.2d at 477, 245 Cal. Rptr. at 419.

23. *Id.*

24. *Id.*

25. *Id.* at 1061-62, 751 P.2d at 477-78, 245 Cal. Rptr. at 419.

26. *Barker*, 20 Cal. 3d at 431-32, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38.

27. *Brown*, 44 Cal. 3d at 1062-65, 751 P.2d at 478-80, 245 Cal. Rptr. at 419-21.

though some risks, perhaps serious ones, might accompany their introduction because drugs save lives and reduce pain and suffering."[28] If strict liability is imposed on prescription drug manufacturers, then such manufacturers might be discouraged from undertaking research and development of new drugs because of the likelihood of imposing liability for unknown dangers and the high cost of obtaining insurance.[29] Thus, although the manufacturer is in a superior position to obtain insurance and spread the costs to consumers, this is outweighed by the detrimental effect the imposition of strict liability would have on the development and distribution of new drugs.[30]

Furthermore, the court stated that because society is benefited by the development of new drugs, a manufacturer should not be strictly liable for failing to warn of dangers which were not known and could not have been scientifically known at the time the drug was distributed.[31] As long as the manufacturer discloses all known or knowable potential side effects of a particular drug, such as DES, to the physician, strict liability cannot be imposed on the manufacturer for failure to warn the patient of a potential danger.[32]

In rejecting the application of the strict liability doctrine to prescription drugs, the court adopted the less strict standard of liability set forth by comment k of section 402A of the Restatement (Second) of Torts.[33] Under comment k, a manufacturer of prescription drugs

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28. *Id.* at 1063, 751 P.2d at 479, 245 Cal. Rptr. at 420. Drugs, as distinguished from other products where strict liability is imposed, are often "necessary to alleviate pain and suffering or to sustain life." *Id.* Thus, it is beneficial to have prescription drugs made available at a low cost to the public. *Id.*

29. *Id.* at 1063-65, 751 P.2d at 479-80, 245 Cal. Rptr. at 420-21.

30. *Id.*

31. *Id.* at 1065, 751 P.2d at 480, 245 Cal. Rptr. at 421. Only a few courts subject a manufacturer to strict liability for failing to warn of a defect regardless of whether the manufacturer could have known about the defect. *See* Halphen v. Johns-Manville Sales Co., 484 So. 2d 110, 114-15 (La. 1986); Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434, 438 (Mo. 1984); Carrecter v. Colson Equip. Co., 346 Pa. Super. 95, 499 A.2d 326 (1985); Little v. PPG Indus., 19 Wash. App. 812, 821-22, 579 P.2d 940, 947 (1978).

32. *Brown*, 44 Cal. 3d at 1066, 751 P.2d at 480, 245 Cal. Rptr. at 422.

33. RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965). Comment k states:

> *k. Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and use of vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there

is liable only for failing to warn of known or knowable dangerous side effects of the drug.[34] Thus, comment k resembles a negligence standard in that liability is not premised on the mere existence of a defective product, but on the failure of the manufacturer to properly prepare the drug or to provide an adequate warning as to all dangers which could have been known at the time of distribution.[35]

Although the court adopted the comment k standard, it rejected the additional requirement set forth in *Kearl v. Lederle Laboratories*[36] that comment k is applicable only to drugs which are "unavoidably dangerous." *Kearl* imposed an obligation on the trial judge to determine, out of the presence of the jury, whether or not the drug was "unavoidably dangerous."[37] If the judge determines the drug is unavoidably dangerous, the comment k standard would be invoked. Otherwise, strict liability would be imposed on all those drugs which did not satisfy this definition.[38] The *Brown* court, in disapproving the *Kearl* test, stated that adoption of such a test would create a likelihood of inconsistency between judges in different cases and between

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> can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965).

34. *Brown*, 44 Cal. 3d at 1059, 751 P.2d at 476, 245 Cal. Rptr. at 417. Most courts have adopted the comment k standard. *See* DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 228-29 (8th Cir. 1983); Basko v. Sterling Drug, Inc., 416 F.2d 417, 426 (2d Cir. 1969); Chambers v. G.D. Searle & Co., 441 F. Supp. 377, 380-81 (D. Md. 1975); Stone v. Smith, Kline & French Laboratories, 447 So. 2d 1301, 1303-04 (Ala. 1984); Johnson v. American Cyanamid Co., 239 Kan. 279, 285-86, 718 P.2d 1318, 1323 (1986); *see also* Carmichael v. Reitz, 17 Cal. App. 3d 958, 988, 95 Cal. Rptr. 381, 400 (1971); Christofferson v. Kaiser Found. Hosp., 15 Cal. App. 3d 75, 79, 92 Cal. Rptr. 825, 827 (1971); Toole v. Richardson-Merrell, 251 Cal. App. 2d 689, 708-11, 60 Cal. Rptr. 398, 412-14 (1967).

35. *Brown*, 44 Cal. 3d at 1059, 751 P.2d at 476, 245 Cal. Rptr. at 417.

36. 172 Cal. App. 3d 812, 828-30, 218 Cal. Rptr. 453, 463-64 (1985).

37. *Kearl*, 172 Cal. App. 3d at 829-30, 218 Cal. Rptr. at 463-64. *Kearl* states that the judge must answer:

> (1) whether, when distributed, the product was intended to confer an exceptionally important benefit that made its availability highly desirable; (2) whether the then-existing risk posed by the product was both 'substantial' and 'unavoidable'; and (3) whether the interest in availability (again measured as of the time of distribution) outweighs the interest in promoting enhanced accountability through strict liability design defect review.

Id. at 829-30, 218 Cal. Rptr. at 464.

38. *Id.* at 829-30, 218 Cal. Rptr. at 463-64.

a judge and jury in the same case.[39] The *Kearl* test might also be a significant deterrent for a manufacturer to develop new drugs because of the possibility that a judge might subjectively determine that the drug was not unavoidably dangerous and apply the strict liability standard.[40]

IV. MARKET SHARE LIABILITY

In *Sindell v. Abbott Laboratories*[41] the court adopted what became known as the market share doctrine of liability. Under the market share doctrine, the *Sindell* court acknowledged that it is often impossible for a plaintiff to trace exactly which manufacturer produced the product that caused the injury.[42] In *Sindell*, the problem was amplified because the drug involved, DES, caused injuries to persons *in utero* after their mothers had consumed the drug during pregnancy.[43] To afford the plaintiffs relief for their injuries, the court stated that as long as a substantial share of the DES manufacturers were joined in the action, all defendants who were unable to prove that they could not have supplied the DES ingested by the plaintiffs' mothers would be liable for that proportion of the judgment which was representative of their respective market share.[44]

The plaintiffs, in *Brown*, sought to hold the defendants jointly and severally liable for the entire judgment under the market share doctrine.[45] The court noted that the market share theory of liability enunciated in *Sindell* balanced the interest in affording the plaintiffs relief for injuries caused by the drug against the interest in ascertaining a reasonable approximation of a defendant's responsibility for the injuries caused by the drug.[46] The court concluded that joint liability, which could lead to one defendant manufacturer being responsi-

39. *Brown*, 44 Cal. 3d at 1067-68, 751 P.2d at 481-82, 245 Cal. Rptr. at 423.

40. *Id.*

41. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

42. *Id.* at 600-01, 607 P.2d at 929-30, 163 Cal. Rptr. at 137-38.

43. *Id.*

44. *Id.* at 612-13, 607 P.2d at 936-37, 163 Cal. Rptr. at 145-46. Although no other jurisdiction has adopted the *Sindell* approach to market share liability, several jurisdictions have adopted modified versions of the market share theory. *See* Shakil v. Lederle Laboratories, 219 N.J. Super. 601, 530 A.2d 1287 (1987); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984); Collin v. Eli Lilly Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984). Several jurisdictions, however, have rejected the market-share theory of liability. *See, e.g.*, Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986); Payton v. Abbott Laboratories, 386 Mass. 540, 437 N.E.2d 171 (1982); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984); Senn v. Merrell Dow Pharmaceuticals, 305 Or. 256, 751 P.2d 215 (1988); Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 505 A.2d 973 (1985).

45. *Brown*, 44 Cal. 3d at 1072, 751 P.2d at 485, 245 Cal. Rptr. at 426. This issue was not addressed in *Sindell*.

46. *Brown*, 44 Cal. 3d at 1074-75, 751 P.2d at 486-87, 245 Cal. Rptr. at 427-28; *see Sindell*, 26 Cal. 3d at 610-12, 607 P.2d at 935-36, 163 Cal. Rptr. at 144-45.

ble for the entire amount of damages regardless of its market share, was inconsistent with the balancing of interests involved in *Sindell*.[47] Thus, defendant manufacturers under the market share theory are liable only for the proportion of the damages which equals their respective share of the market.[48]

The *Brown* court also rejected the plaintiffs' assertion that causes of action for fraud and breach of warranty could be maintained under the market share doctrine.[49] The plaintiff, in a cause of action for fraud, would be unable to prove the requisite knowledge or intent of the defendants making the alleged representation under the market share theory.[50] The breach of warranty causes of action were rebutted by the court because such actions were inconsistent with the court's prior determination of the scope of liability for manufacturers of prescription drugs.[51] Therefore, "a plaintiff who proceeds on a market share theory may not prosecute a cause of action for fraud or breach of warranty."[52]

V. CONCLUSION

The California Supreme Court has determined that, as a policy, the development and distribution of new prescription drugs is desirable. Strict liability should not be imposed on manufacturers of prescription drugs for injuries caused by defects not known or scientifically knowable at the time of distribution. By adopting the comment k standard, which does not subject manufacturers to strict liability unless the drug was improperly prepared or the manufacturers failed to provide appropriate warnings, the court is encouraging the development of new drugs. Manufacturers may distribute prescription drugs and will not be held liable for defects which they could not have detected at the time of distribution.

Additionally, the court clarified the application of the market share theory of liability enunciated in *Sindell*. By acknowledging that the market share theory of liability balances the competing in-

47. *Brown*, 44 Cal. 3d at 1075, 751 P.2d at 486-87, 245 Cal. Rptr. at 428.

48. *Id.* at 1074-75, 751 P.2d at 486, 245 Cal. Rptr. at 428. *But see* Martin v. Abbott Laboratories, 102 Wash. 2d 581, 605-07, 689 P.2d 368, 382-83 (those defendants remaining in the case where presumed to have produced the entire market upon which the final percentages of liability were to be based unless they proved they had a smaller portion of the market).

49. *Brown*, 44 Cal. 3d at 1070-72, 751 P.2d at 483-84, 245 Cal. Rptr. at 425-26.

50. *Id.* at 1070-71, 751 P.2d at 483-84, 245 Cal. Rptr. at 425-26.

51. *Id.* at 1072, 751 P.2d at 484, 245 Cal. Rptr. at 426.

52. *Id.*

terests of injured plaintiffs and defendant manufacturer, the court is unwilling to allow plaintiffs to expose manufacturers to liability beyond their respective market share. Although the market share doctrine allows a plaintiff to recover for injuries which result from the use of a drug such as DES, the court stated that recovery is limited to a manufacturer's market share.

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